

OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS
Stella B. Werner Council Office Building
Rockville, Maryland 20850
(240) 777-6660

IN THE MATTER OF:
POTOMAC EDISON COMPANY
Applicant

Justin P. Walter
Karl G. Lotspeich
For the Application

Gregory E. Rapisarda, Esquire
Attorney for the Applicant

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OZAH Case No. CU 19-07

Before: Martin L. Grossman, Hearing Examiner
Director, Office of Zoning and Administrative Hearings

HEARING EXAMINER'S REPORT AND DECISION

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I. STATEMENT OF THE CASE

On December 18, 2018, the Applicant, Potomac Edison Company, filed an application, pursuant to Zoning Ordinance §59.3.6.7.E, seeking a Conditional Use to allow construction and operation of a Public Utility Structure, known as the Cabin Branch Substation,¹ at 22800 Whelan Lane, in Boyds, Maryland. The conditional use site consists of a 0.702-acre (30,573 square foot) plot of land, carved out of a 12.02-acre tract owned by Montgomery County. The County granted the Applicant a 99-year exclusive easement for the site (Exhibit 5), which is located approximately 100 feet north of Whelan Lane's intersection with Clarksburg Road. It is in the EOF (Employment Office) Zone and the Clarksburg West Environmental Overlay Zone. The site is subject to 10 Mile Creek Area Limited Amendment to the Clarksburg Master Plan and Hyattstown Special Study Area. The land is owned by Montgomery County, and is identified as Parcel P 930 on Tax map EW21, with Tax ID No. 02-03674732 (Exhibit 50(a)).

On March 6, 2019, the Office of Zoning and Administrative Hearings (OZAH) issued a notice scheduling a public hearing to be held on April 12, 2019 (Exhibit 38), and a corrected Notice (Exhibit 39) was issued on March 13, 2019.

On March 14, 2019, the Applicant filed revised plans, including a Preliminary Forest Conservation Plan (Exhibit 42(a)), a revised Conditional Use Plan (Exhibit 42(b)) and a revised Landscape Screening and Lighting Plan (Exhibit 42(c)). A notice of the proposed amendments to the Applicant's plans was issued on March 26, 2019. There were no objections.

The Technical Staff of the Montgomery County Planning Department (Technical Staff or Staff) issued a report on March 15, 2019, recommending approval of the application, subject to four conditions. Exhibit 43. The Montgomery County Planning Board met on March 28, 2019, and voted unanimously (4-0) to recommend approval of the application, with the conditions

¹ Technical Staff refers to the proposed structure as the "Clarksburg Substation," which is understandable given its proximity to Clarksburg; however, the Applicant's filings (*e.g.*, Exhibit 42(b), the Conditional Use Plan) refer to the proposed structure as the Cabin Branch Substation.

recommended by Staff,² as indicated in the Chair's letter of April 2, 2019. Exhibit 54. The Chair's letter noted that the Board had also approved the Preliminary/Final Water Quality Plan (P/FWQP) and the Preliminary/Final Forest Conservation Plan (P/FFCP).

The public hearing proceeded as scheduled on April 12, 2019. The Applicant adopted the findings and conclusions of the Technical Staff, and agreed to Staff's recommended conditions, with some modifications. Tr. 12-19. The Applicant also called two witnesses in support of tis application (Justin Walter and Karl Lotspeich), and introduced an affidavit of posting (Exhibit 62), a resume of Mr. Lotspeich (Exhibit 63) and a copy of the Revised Impervious Area Plan (Exhibit 64), which had been previously filed with and reviewed by Technical Staff. There were no other witnesses, and there has been no opposition from the community.

The record closed, as scheduled on April 18, 2019. For the reasons set forth at length in this Report and Decision, the Hearing Examiner approves the conditional use application, subject to the conditions listed in Part IV, below.

II. FACTUAL BACKGROUND

A. The Subject Property

As noted above, the conditional use site consists of a 0.702-acre (30,573 square foot) plot of land, carved out of a 12.02-acre tract owned by Montgomery County. The County granted the Applicant a 99-year exclusive easement for the site (Exhibit 5). It is located approximately 100 feet north of Whelan Lane's intersection with Clarksburg Road, and about ¾ of a mile south of the Montgomery County Correctional Facility, located at 22880 Whelan Lane. The site is in the EOF-0.75 H-100 T (Employment Office) Zone and the Clarksburg West Environmental Overlay Zone. It is subject to the 10 Mile Creek Area Limited Amendment to the Clarksburg Master Plan and Hyattstown Special Study Area. Technical Staff describes the site as follows (Exhibit 43, pp. 3-4):

² Technical Staff modified its recommended Condition No. 4 to eliminate the need for a van accessible handicap space, and the Planning Board agreed with that change.

Currently, the subject property is unimproved and is generally wooded with existing trees concentrated at the southwest and western edges of the property. There is a small patch of graveled impervious area covering approximately 12,505 square feet at the western edge of the property, with approximately 12,159 square feet of the gravel area located within the proposed easement that will accommodate the proposed use. There is an existing driveway apron along the property's frontage on Whelan Road. The existing driveway will be modified as part of the proposed Conditional Use. The site is entirely within the 10 Mile Creek Special Protection Area (SPA).

The Applicant provided photographs showing the existing area around the site, which are reproduced below (Exhibit 42(c)(iii)):



Photograph 1.
Facing Southwest from Whelan Lane



Photograph 2.
Facing West at Gate Location

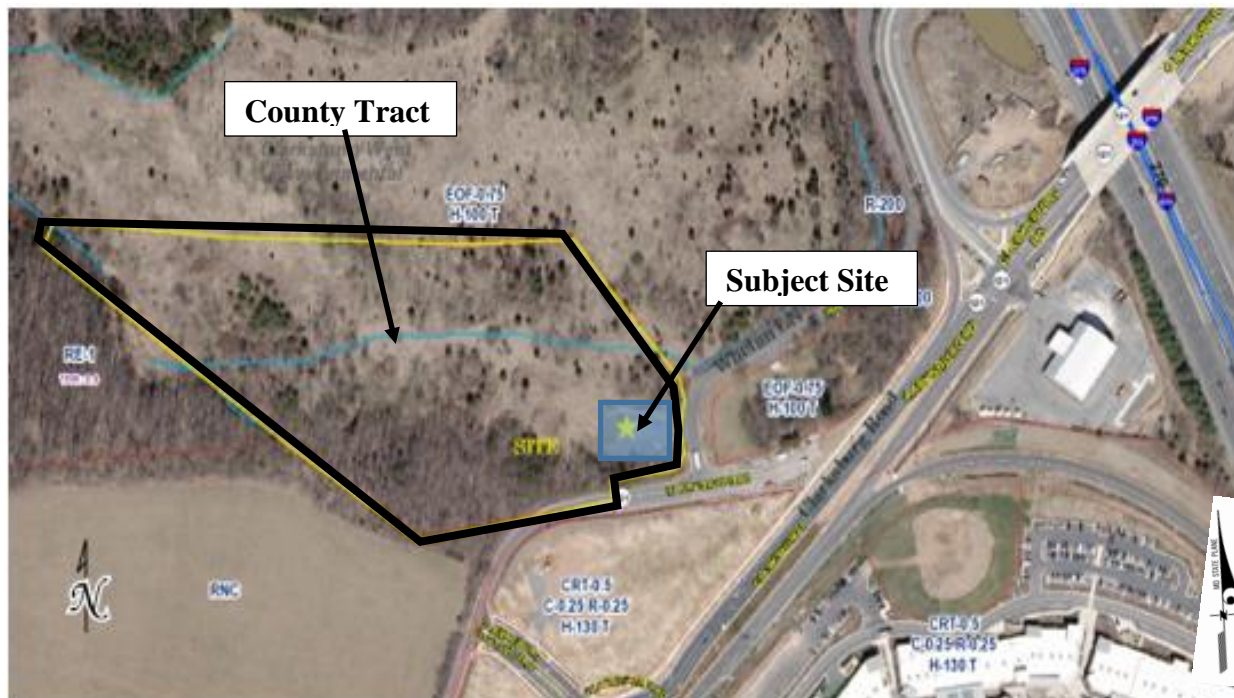
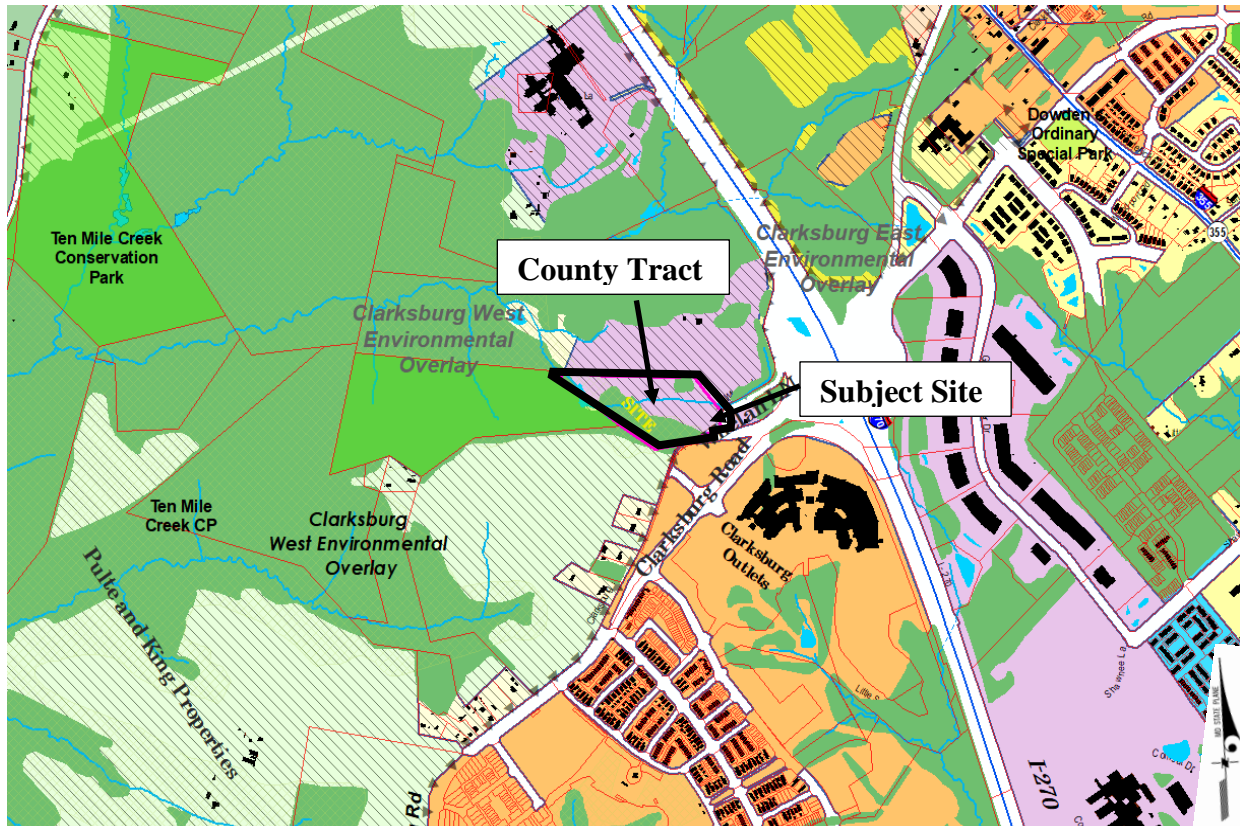


Photograph 4.
Facing North from Clarksburg Road

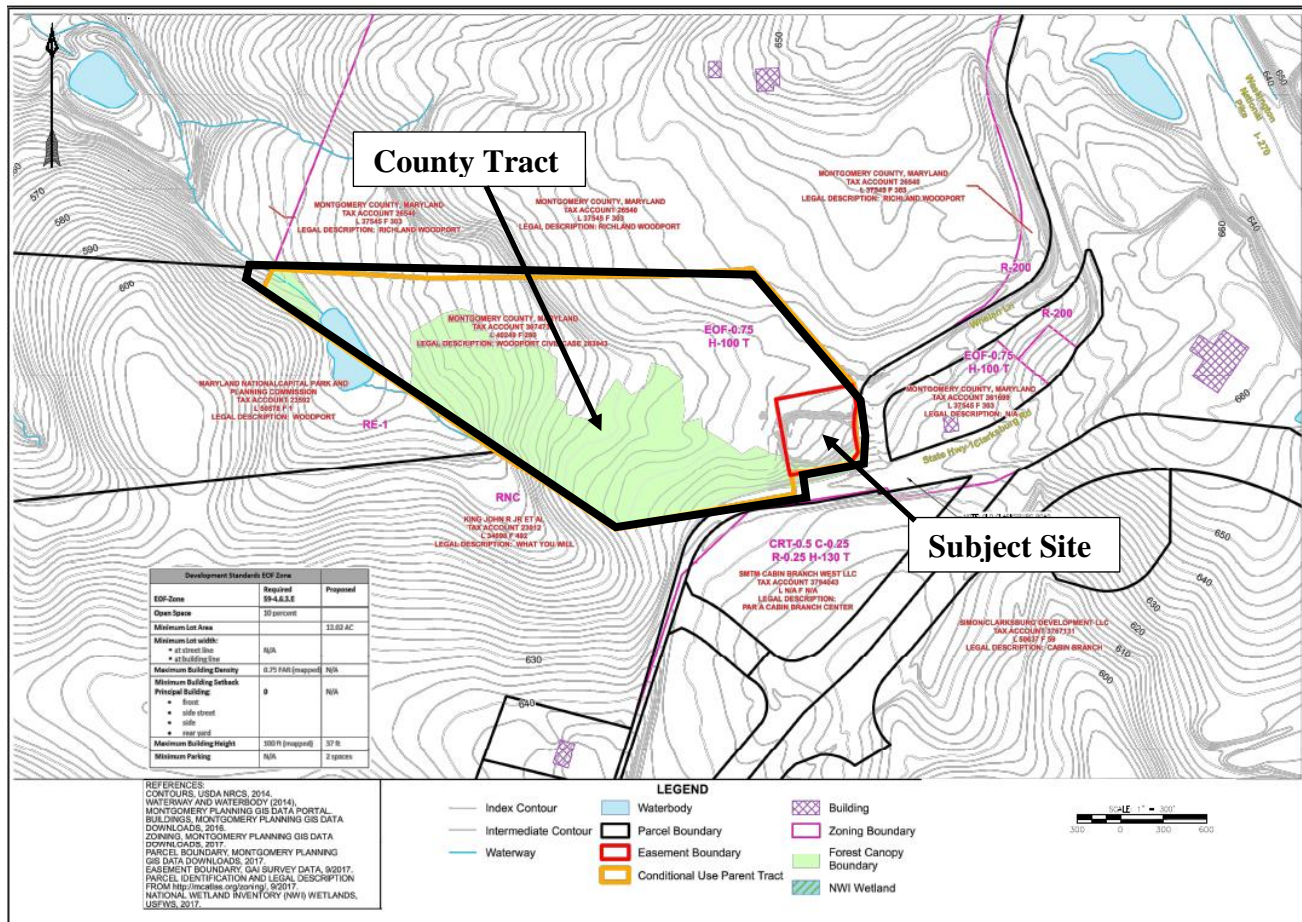


Photograph 5.
Facing North from Field

The County's property containing the conditional use site is depicted in a Vicinity Map and aerial photo supplied by Technical Staff (Exhibit 43, pp. 3-4):



The County Tract and the Conditional Use Site are also clearly delineated on the Vicinity map provided as part of the Applicant's final conditional Use plan (Exhibit 42(b)(i)):³



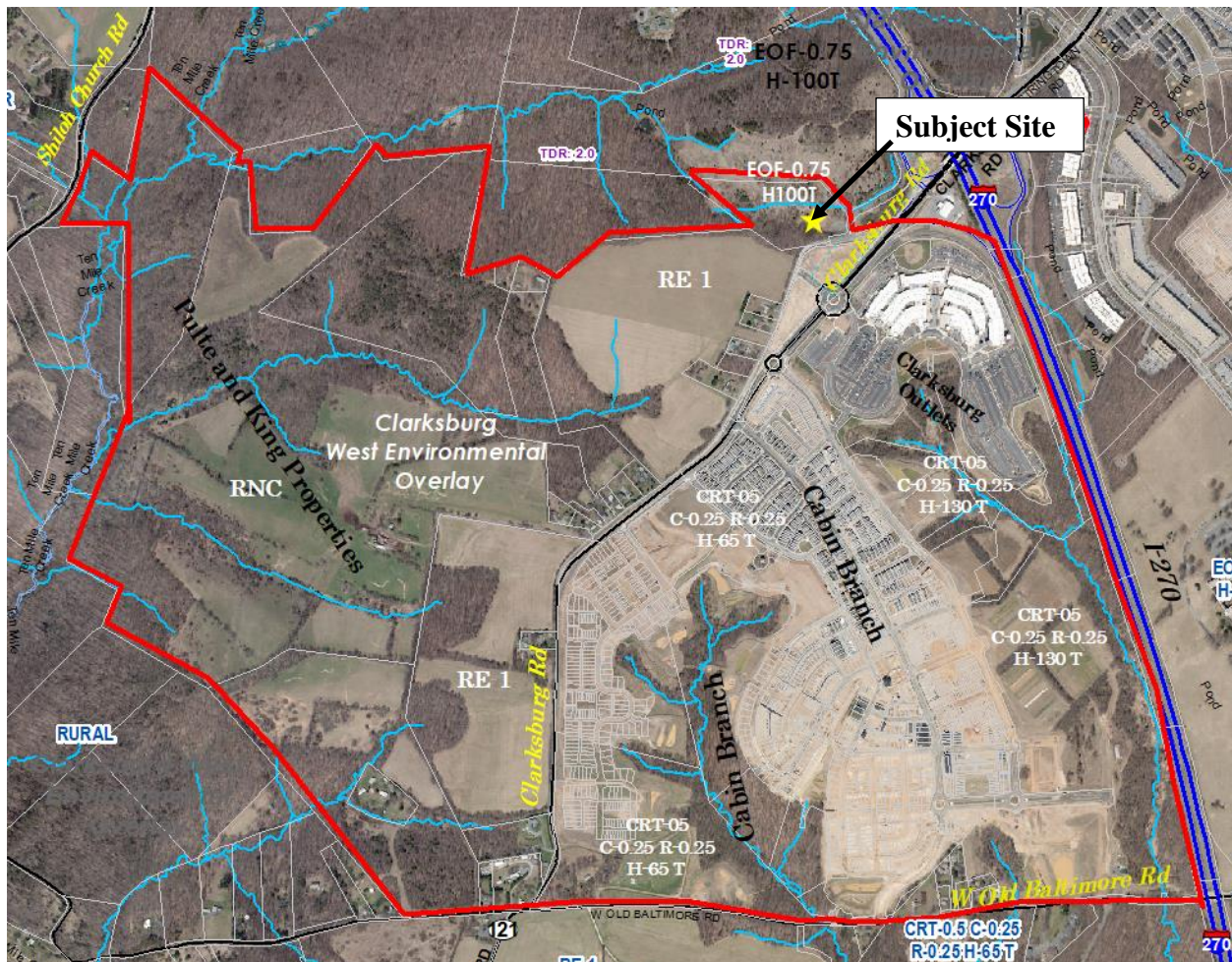
B. Surrounding Neighborhood

For the purpose of determining the compatibility of the proposed use, it is necessary to delineate and characterize the “surrounding neighborhood” (*i.e.*, the area that will be most directly impacted by the proposed use). Staff proposed defining the neighborhood “based on the demand for electricity that the proposed substation proposes to meet.” Exhibit 43, p. 4. Thus, Staff proposed the following Neighborhood Boundaries:

³ With the agreement of the Applicant, the Hearing Examiner corrected the scale shown on the vicinity map from 1 inch = 300 feet to 1 inch = 100 feet. Tr. 49-51.

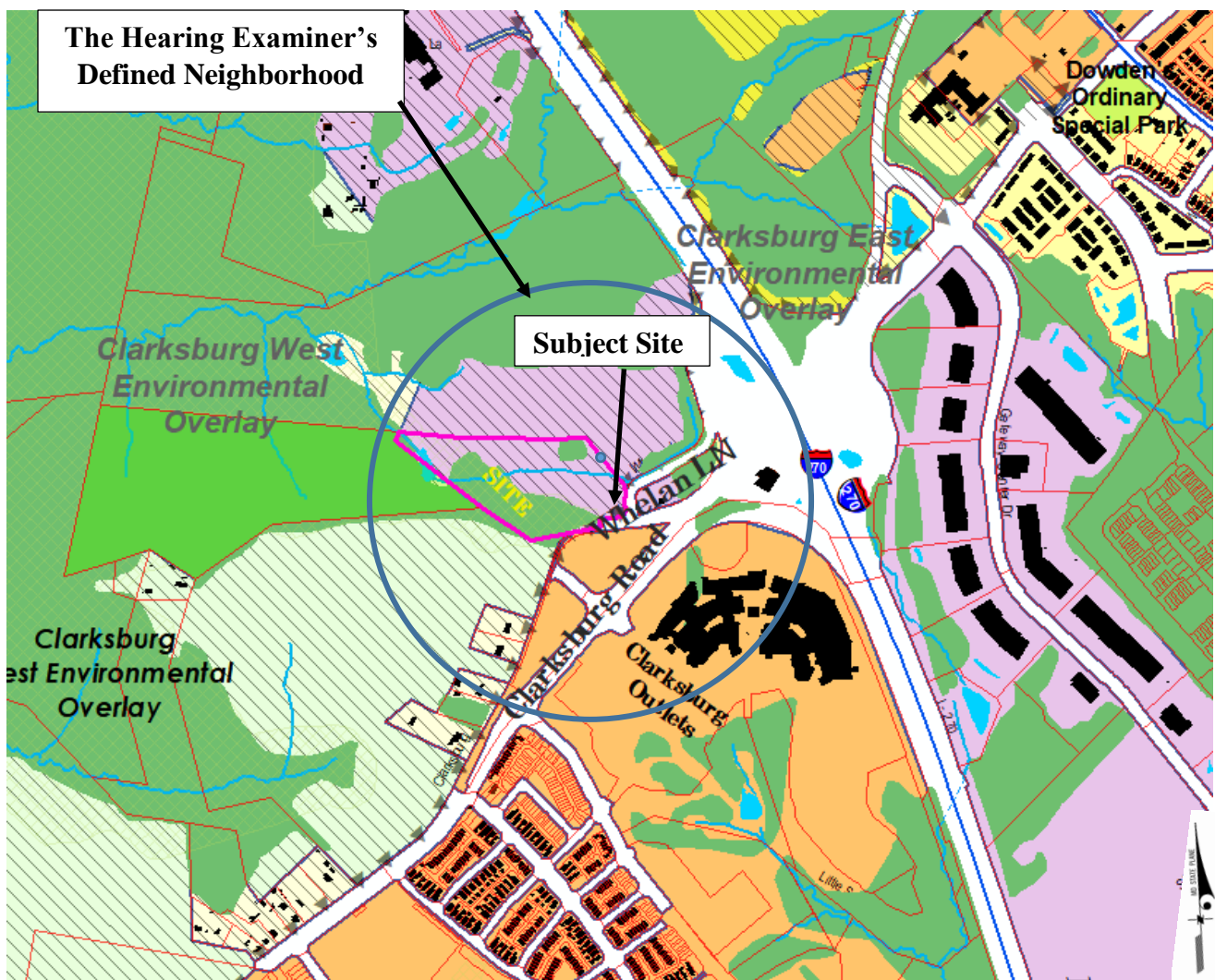
North: 10 Mile Creek Conservation Park and Montgomery County Properties
 East: I-270
 West: 10 Mile Creek and the south and southwest boundaries of the 540 acre Pulte and King Properties
 South: West Old Baltimore Road

The neighborhood, as Staff proposed to define it, is shown below, outlined in red (Ex. 43, p. 5):



The Hearing Examiner does not agree with Staff's suggestion that the neighborhood should be defined by reference to the electrical service area for the proposed substation. For zoning purposes, the goal is to define the neighborhood to include those that will be most directly impacted by the proposed use in terms of site, sound, traffic, stormwater runoff, and other potentially adverse effects. The improved electrical service capacity in the area may be

considered as a public benefit to be factored in, but it is not relevant in defining who will be subject to potentially adverse effects by the granting of the conditional use. Since increased traffic is not a potential side effect of this type of use, the neighborhood should be defined to include those who will be in sight and/or sound of the facility or who may experience other adverse effects from stormwater runoff or the like. Defining the neighborhood as approximately a 1,000-foot radius around the center of the proposed facility ought to capture those most exposed to any adverse effects, and the Applicant agrees to that definition. Tr. 22-23. That area is shown on a portion of the Vicinity Map provided by Staff (Exhibit 43, p. 3), which is reproduced below:



While Technical Staff's proposed neighborhood includes properties east of Clarksburg Road with "a large multi-phased, mixed-use community (Cabin Branch) zoned CRT-0.5 C-0.25 R-0.25 H-130 T and CRT-0.5C-0.25 R-0.25 H-65" (Exhibit 43, p. 4), that area is largely outside the Hearing Examiner's defined neighborhood since it is too far away to be adversely impacted by the proposed use. A portion of the Clarksburg Premium Outlets would be within the 1,000-foot radius, but there would be no adverse effects on those commercial establishments. The portion of the neighborhood (as defined by the Hearing Examiner) located west of Clarksburg Road may contain future residential development, but appears to be largely undeveloped at this time.

C. Proposed Use

The Applicant proposes to develop the subject property with an unmanned modular electrical substation located on a site of approximately 0.702 acres (30,573 square feet). It is intended to "serve the increased demand for electric services from new developments" Applicant's Statement of Compliance and Justification (Exhibit 1, p. 1). The project is described by Technical Staff (Exhibit 43, p. 6):

The Applicant, Potomac Edison Company, seeks approval of a Conditional Use to allow construction of a modular electric substation facility. The unmanned substation is needed to accommodate higher service demand in the area brought about by increased residential, office and commercial developments which include 2,386 units residential units and 2.42 million square feet commercial space, including an outlet mall, office buildings gas station, bank, hotel, restaurants, public use, some of which are currently under construction. The new distribution will help to alleviate predicted overloads.

The Applicant's supplemental statement indicates that the proposed structure will be served by incoming transmission lines that are completely underground until inside the fenced substation facility. The components of the substation include [a]⁴ transformer . . . with all distributions lines leaving the facility placed entirely underground.

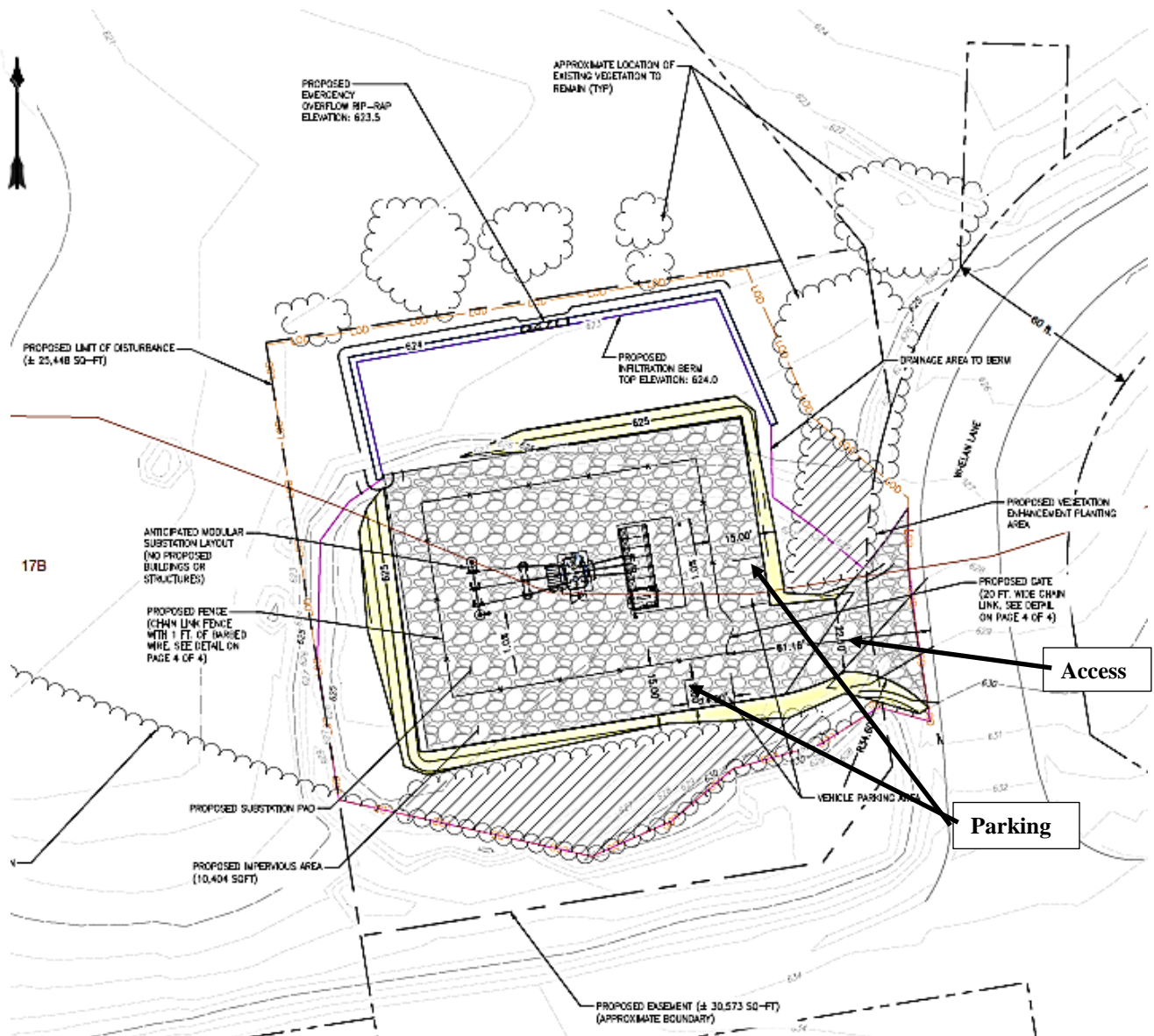
⁴ Based on testimony at the hearing (Tr. 36-38), Technical Staff misstated the number of transformers that will be on site. Although there will be multiple pieces of electrical equipment to reduce the incoming voltage from 34,500 volts to an outgoing voltage of 12,000 volts, there will be only one transformer feeding four outgoing circuits. Staff had erroneously indicated that would be four transformers, and the Hearing Examiner has eliminated that reference.

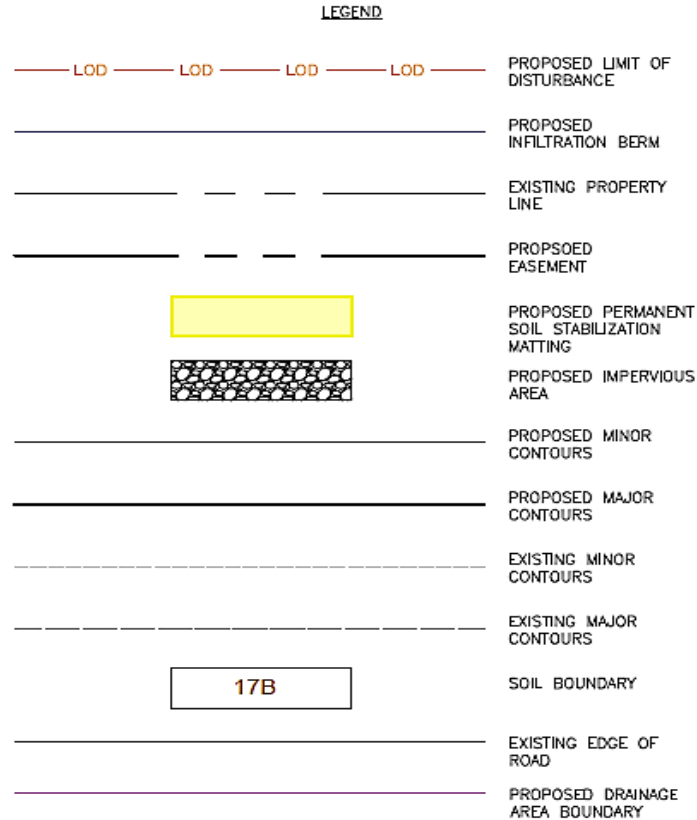
1. Proposed Structure, Site Plan, Access, Parking, and Simulated Views

As described by Technical Staff (Exhibit 43, p. 7),

The proposed substation will be accessed from Whelan Lane via a single driveway. The existing driveway apron will be modified and upgraded to meet the needs of the proposed use. The driveway apron will be widened to 60 feet, then narrowing to 22 feet wide in the interior of the subject property. The Conditional Use site plan provides ample space for two parking locations, one in the front yard and the second in the side yard, both of which will be accessed directly from the main driveway. The Applicant's statement identifies the types of maintenance vehicles visiting the site to include primarily pick-up trucks, small vans, or SUVs.

The final Conditional Use Plan - Site Layout for the proposed substation (Exhibit 42(b)(ii)) is reproduced below and on the following page:



NOTES:

1. FOR LIGHTING AND FENCE DETAILS SEE LANDSCAPE SCREENING AND LIGHTING PLAN
2. ALL EXISTING IMPERVIOUS AREA WITHIN THE LIMIT OF DISTURBANCE (EXTENTS SHOWN ON EXISTING USE PLAN) SHALL BE REMOVED ACCORDING TO APPROVED WATER QUALITY PLAN.

INFILTRATION BERM							
BERM HEIGHT (FT)	EFFECTIVE INFILTRATION BERM LENGTH (FT)	INFILTRATION LENGTH PER LINEAR FOOT (FT)	INFILTRATION AREA (FT ²)	AVERAGE SLOPE OF EXISTING GROUND (%)	CALCULATED IMPOUNDMENT (FT ³ /LF)	TOTAL VOLUME PROVIDED BY BERM (FT ³)	TOTAL VOLUME REQUIRED (FT ³)
1	110	33	3630	3	15	1650	1390

The proposed electrical equipment is described in Part II.C.3. of this Report and Decision. There will be no building on the site (Tr. 44), but the equipment will be surrounded by a 7-foot fence topped with barbed wire to protect against unauthorized entry to the facility. Tr. 69.

The intended modular substation, and its proposed screening, are depicted in Simulated Views from Whelan Lane, provided by the Applicant (Exhibit 46). They are reproduced on the next page.

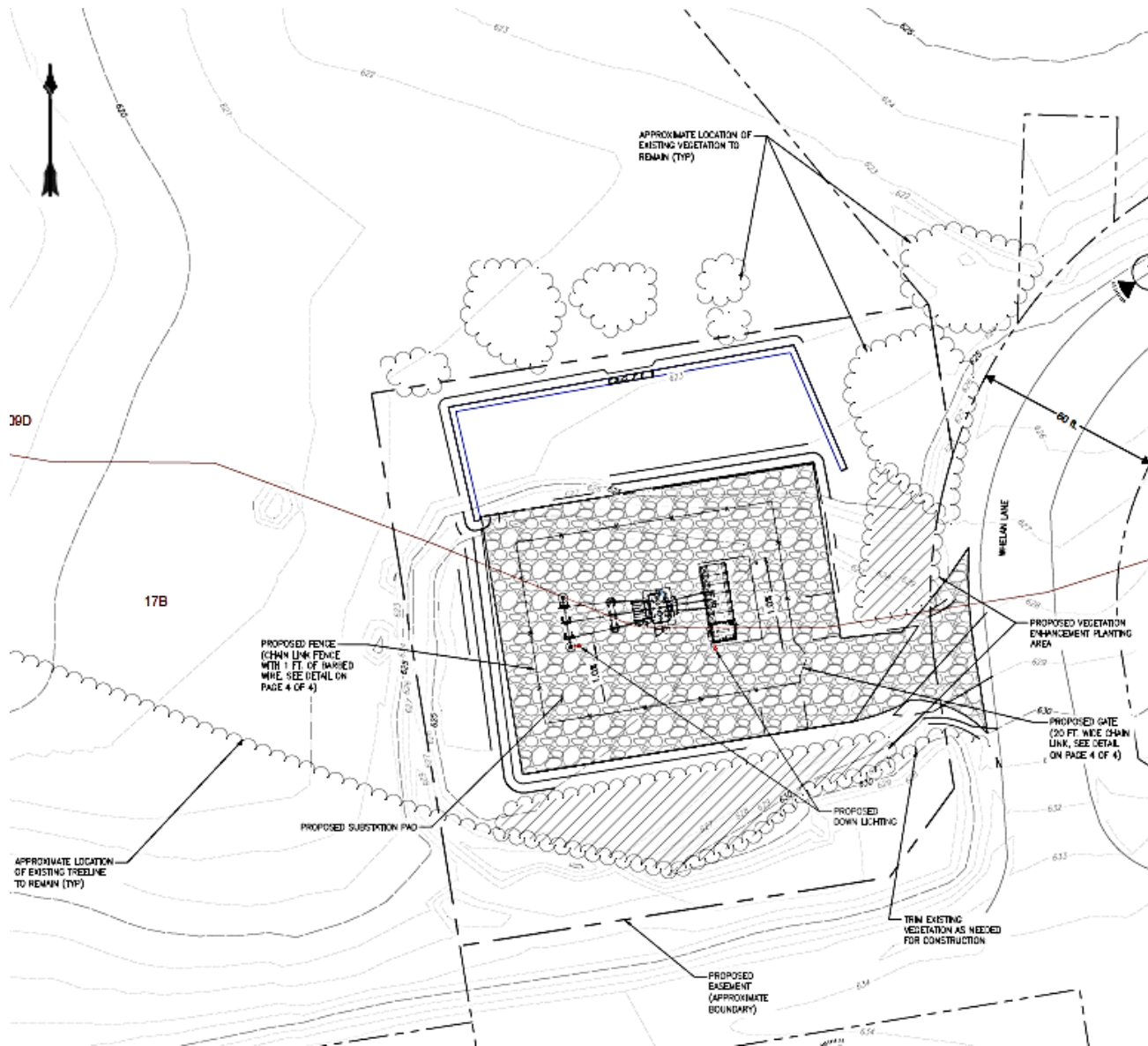


Simulated Views of the Proposed Facility from Whelan Lane



2. Site Landscaping, Lighting and Signage

The Applicant submitted a revised Landscape, Screening and Lighting Plan (Exhibit 42(c)), and it is reproduced below and on the next page:



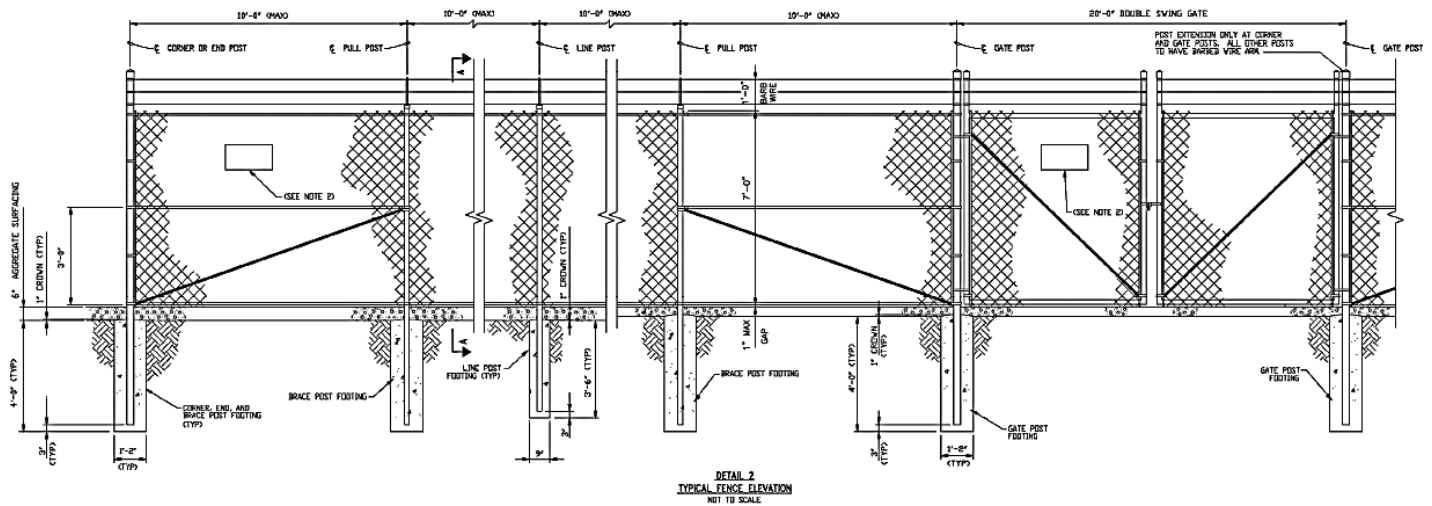
Planting Schedule

Vegetation Enhancement Planting Area

Species		Mature Height (feet)	Size	Plant Spacing (feet O.C.)	Quantity
Scientific Name	Common Name				
<i>Alnus rubra</i>	Red Alder	15-30	1" -2" cal./ Min. 6' ht.	7'-10'	10
<i>Acer rubrum</i>	Red Maple	15-40	1" -2" cal./ Min. 6' ht.	7'-10'	10
<i>Ilex opaca</i>	American Holly	15-30	1" -2" cal./ Min. 6' ht.	7'-10'	6
<i>Amelanchier sp.</i>	Service Berry	10-25	1" -2" cal./ Min. 6' ht.	5'-8'	12
<i>Cornus florida</i>	Flowering Dogwood	15-20	1" -2" cal./ Min. 6' ht.	5'-8'	16
<i>Cercis canadensis</i>	Redbud	20-30	1" -2" cal./ Min. 6' ht.	5'-8'	16
Total =					70

** Material should be purchased from a native plant nursery. Installation shall be in spring or fall. They should be planted in the ground within 3-5 days of purchase.

Total Plant Area = 3,340 square feet



Technical Staff evaluated the proposed landscaping and screening (Exhibit 43, pp. 12 and 16-17), stating:

The proposed landscaping with an emphasis on native species is adequate, safe, and efficient. The Landscape Plan achieves the stated objectives in the Zoning Ordinance while providing an attractive appearance throughout the year. Along with existing forest on the property, the landscaped area provides screening and buffering between the project and adjacent roads as well as the nearest residential property, which is 850 feet southwest of the proposed facility. The Application will substantially meet the tree canopy coverage requirement as well.

* * *

The proposed landscape plan provides for extensive screening, in the form of landscaping that includes a combination of shade and ornamental trees and shrubs, on all sides of the property including its frontages on Whelan Lane. A six-foot-tall chain link fence with a one-foot anti-climbing barbed wire top is also proposed with the landscaping and screening of the property. The fence, which will surround the electrical equipment powering the modular substation, is screened by existing trees and the proposed landscaping. It will provide an added safety and secure element without affecting the aesthetic appearance of the property.

Access to the site and into the structure will be restricted. Directional lighting and surveillance cameras will be included for added security.

The Applicant described the proposed lighting for the facility in its Statement of Compliance and Justification (Exhibit 1, p. 9):

Potomac Edison will install two downward pointing 2000 Prismatic LED luminaries that will operate in the evenings and two upward pointing lighting that

will operate in the evenings during emergency repairs and night inspections. With the exception of emergency repairs and night inspections, Potomac Edison will not use the upward pointing lighting.

The details of the proposed lighting are included in Exhibit 8. The Applicant's quoted description of the lighting does not completely coincide with Technical Staff's description of the lighting, since Staff's description refers only to the downward pointing lights, and does not mention "upward pointing lighting." As stated by Technical Staff (Exhibit 43, p. 13):

The proposed lighting will not cause glare on adjoining properties, nor will it exceed the 0.1 foot-candle standard at the side and rear property. The Landscape & Lighting Plan for the substation provides 2 small light fixtures on the site; both are down-lights which will not generate excessive light. Given the number and types of light fixtures, staff does not believe that a photometric plan is needed in this case.

Given the discrepancy between the Applicant's Statement and Staff's account, the Hearing Examiner raised the question at the hearing, to which the Applicant's Project Manager, Justin Walter, responded by pointing out that the upward facing lights will only be used when nighttime emergency repair visits are needed. Mr. Walter noted that the upward pointing emergency lights are depicted (but not labelled) in the diagram of the Typical Modular Substation Cross-Section in the Landscape, Screening and Lighting Plan (Exhibit 42(c)(ii)), shown on the next page. They are located on the same horizontal poles that hold the two downward pointing lights. Tr. 45-48.

Since the upward pointing lights will be used only in emergencies, the Hearing Examiner concludes that lighting for the proposed site will not be unduly intrusive into abutting properties.

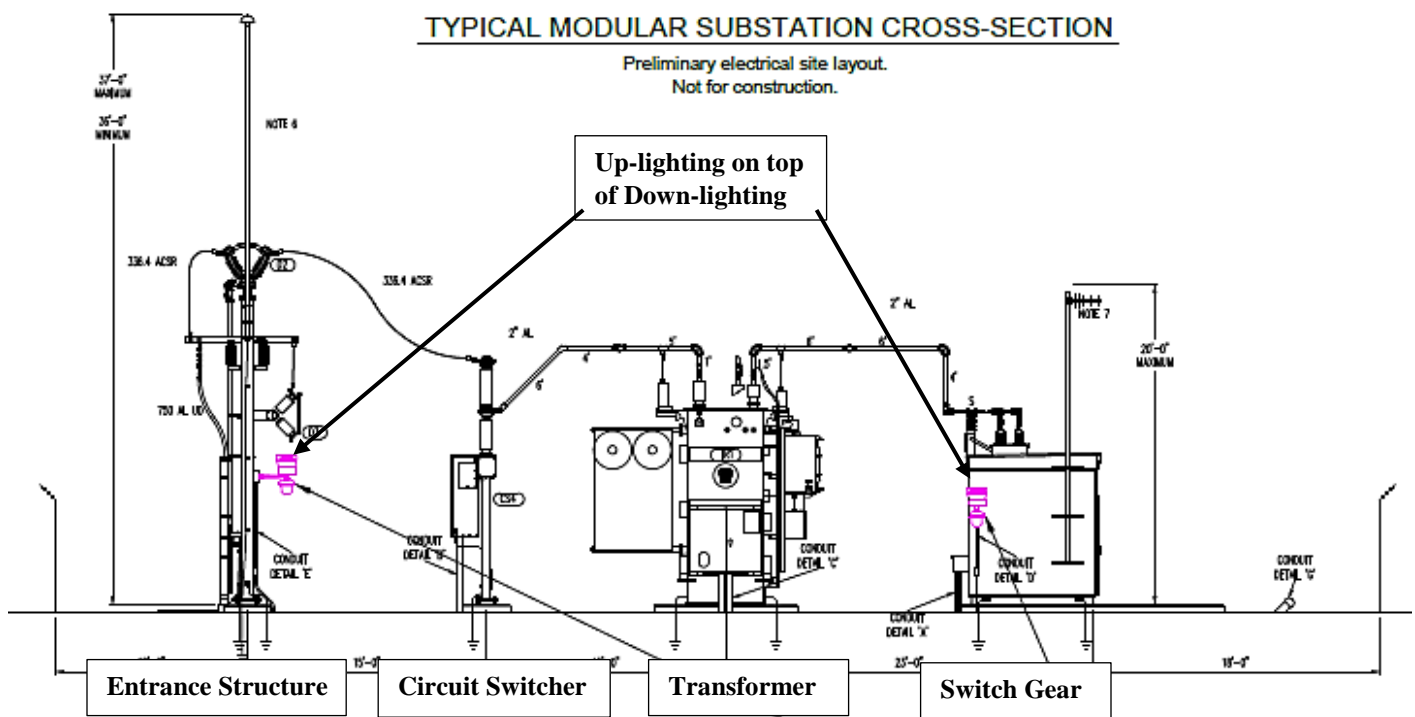
As to signage, Technical Staff states that "There will be no freestanding sign identifying the proposed use on the property." Exhibit 43, p. 13. Staff also recommended a condition to that effect (Exhibit 43, p. 2), which provides, "No identification sign, other than safety signs and those required by law, shall be placed on the property." The Applicant agreed to that condition (Tr. 13), and it is imposed in Part IV of this Report and Decision.

3. Internal Physical Arrangements for Site Operations

The proposed internal physical characteristics of the facility were described at the hearing by Justin Walter, a licensed engineer, who is the Project Manager for this site (Tr. 36-38).

According to Mr. Walter, an underground cable carrying 34,500 volts will feed into the site. There are four main pieces of equipment in the substation, as depicted in the Typical Modular Substation Cross-Section on Exhibit 42(c)(ii), reproduced below. The first piece of equipment on the left is the Entrance Structure, topped by a lightning rod which extends up to 37 feet in height; the next is a Current Switcher, which protects the other equipment against electrical faults; the current is then directed to a single Transformer that will reduce the incoming voltage from 34,500 volts to an outgoing distribution voltage of 12,000 volts; and finally there is a Switch Gear (in a cabinet) that distributes the reduced-voltage current to four outgoing underground circuits.

The Cross-Section showing the transformer and other internal equipment and lighting fixtures is shown below (Exhibit 42(c)(ii)):



4. Operations

Proposed operations were summarized by Technical Staff (Exhibit 43, p. 6):

The Applicant's statement further indicates that the unmanned substation will be operated year around. The property will be monitored remotely by security cameras and access to the building⁵ will be controlled by a key card security system. Employees will visit the site only once per month for routine maintenance of electrical infrastructure as well as grounds keeping and landscaping. Unscheduled maintenance visits by employees may be required in the event of equipment malfunctions or tripped alarms.

It is clear that operations on the site will create almost no additional traffic and no direct adverse impacts on the neighbors, considering the distance separating the site from existing residential development; however the site is in a Special Protection Area (SPA), and therefore potential environmental impacts will be discussed in Part II.E., below.

D. Community Response

As mentioned in the first part of this report, there has been no community response to this application, either in support or opposition.

E. Environmental Impacts

The subject site is entirely within the 10 Mile Creek Special Protection Area (SPA). As a result, the Applicant submitted a Combined Water Quality and Stormwater Management Plan-P/FWQP (Exhibit 15 and 15(a)), a Preliminary/Final Forest Conservation Plan-P/FFCP (Exhibit 42(a)) and an Impervious Area Plan (Exhibit 37(c)). The Applicant's Natural Resource Inventory/Forest Stand Delineation (NRI/FSD), #420180400, for the 12.02-acre property was approved on December 5, 2017. Exhibit 13. As noted by Technical Staff (Exhibit 43, pp. 13-14),

The NRI/FSD identifies the environmental features and forest resources on the Subject Property. The 12.02-acre Property is located within the 10 Mile Creek watershed, classified by the State of Maryland as Use Class I-P waters. The

⁵ As noted earlier, there will be no building on the site (Tr. 44), so Staff should more properly have referred to access to the enclosure, not to a "building."

NRI/FSD identified one tributary stream located in the western end of the property, approximately 3.5 acres of environmental buffer associated with the on-site and off-site streams, and slopes ≥ 15 percent on the Subject Property.

There [are] approximately 4.90 acres of forest, including approximately 2.2 acres of forested environmental buffer on the property. There are no highly erodible soils or mapped 100-year floodplains on the property. In addition to the environmental features, there is an area of gravel/fill located in the eastern portion of the property, adjacent to Whelan Lane. The property is located within the 10 Mile Creek Special Protection Area and the Clarksburg West Environmental Overlay Zone.

This property meets all applicable requirements of Chapter 22A of the County Code. A Preliminary/Final Forest Conservation Plan (“FCP”) for the project was submitted with the Conditional Use Application. The FCP is recommended for approval as a separate action by the Planning Board as part of this Conditional Use Application.

* * *

Under the provision of the Special Protection Area Law, the Montgomery County Department of Permitting Services (MCDPS), the Planning Board, and the Montgomery County Department of Environmental Protection (MCDEP) have different responsibilities in the review of a Water Quality Plan . . .

1. Water Quality:

With regard to water quality standards, Technical Staff observed (Exhibit 43, p. 4):

Under the SPA law (Section 8 of Montgomery County Executive Regulation 29-95 – Water Quality Review for Development in Designated Special Protection Areas), development projects within an SPA are subject to approval of a Water Quality Plan. The Applicant has submitted a detailed stormwater management concept and a Preliminary Water Quality Plan for review and approval by the Planning Board, which is analyzed in a companion staff report.

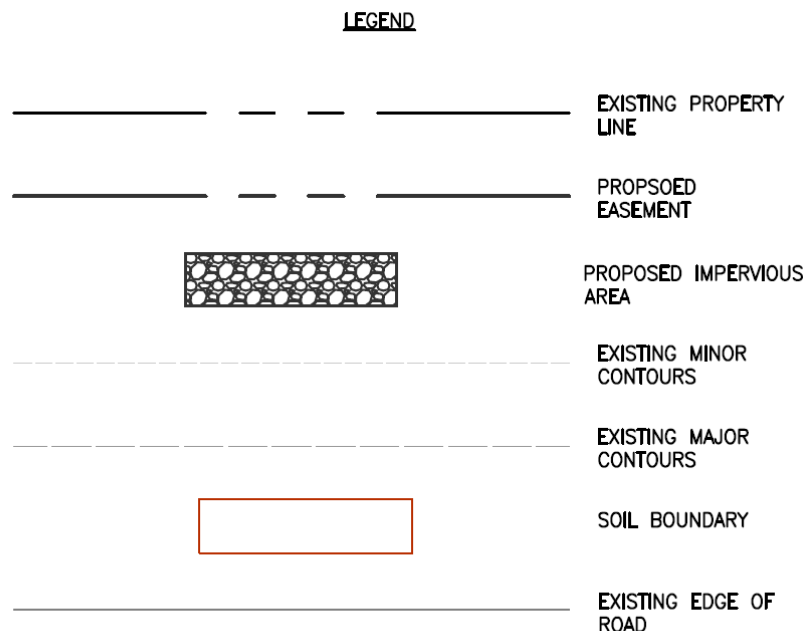
The Department of Permitting Services (DPS) found the Water Quality plan acceptable in a letter dated November 1, 2017 (Exhibit 15). DPS stated that, “The Water Quality Plan proposes to meet required stormwater management goals via a reduction in existing impervious area and the use of an infiltration berm.” According to Technical Staff, “The disturbance associated with the Application is limited to an area that has already been disturbed and includes impervious cover. The existing impervious surfaces will be removed, and the new impervious

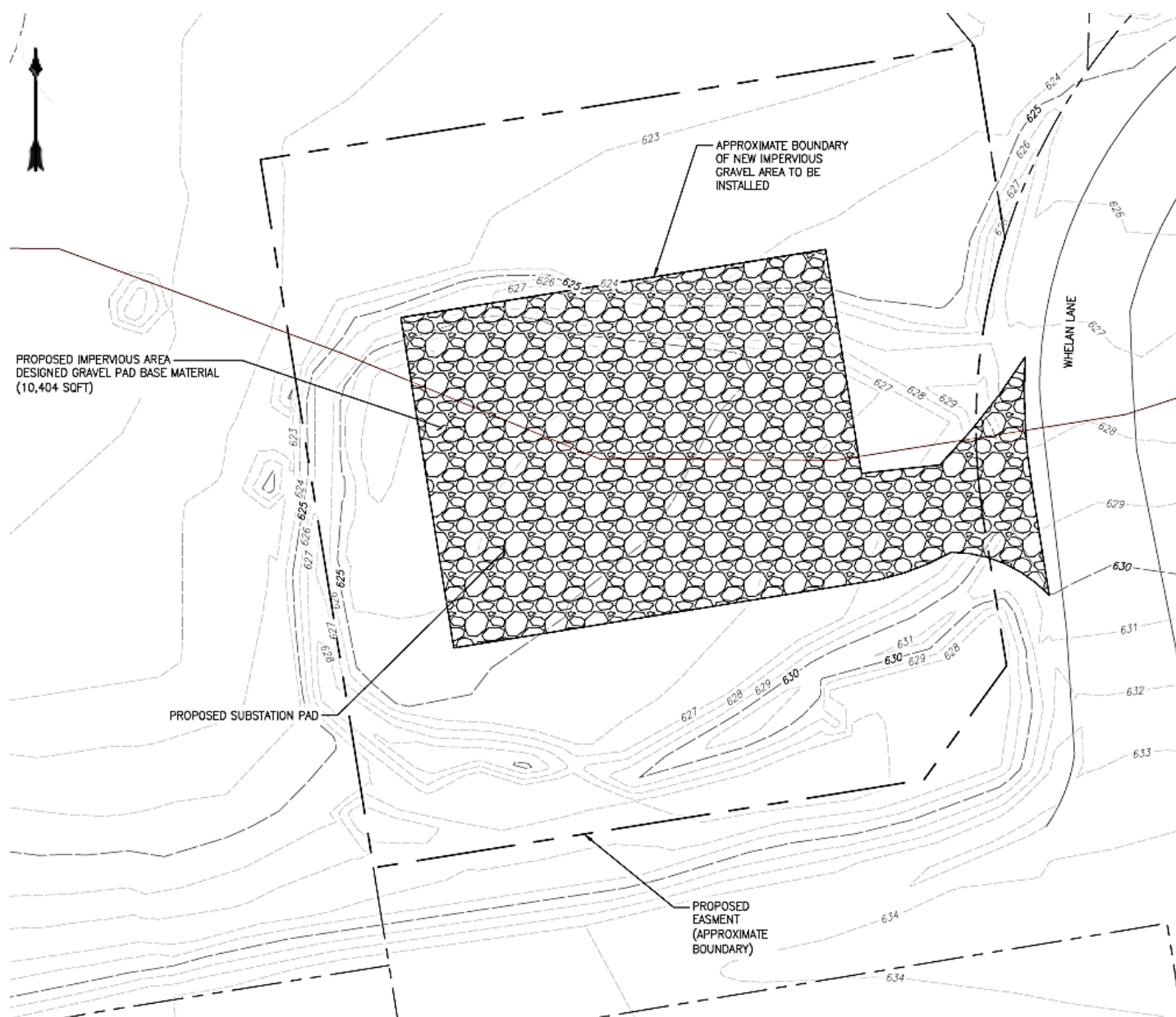
surface for the substation will result in a net decrease in impervious surface on the property, which will also be less than six percent.” Exhibit 43, pp. 8-9. Staff then went on to explain, in more detail, the proposed actions to reduce imperviousness on the site (Exhibit 43, pp. 9-10):

Impervious surface restrictions for development projects in this portion of the 10 Mile Creek SPA are set forth in the Clarksburg West Overlay Zone. As per Chapter 59, Section 4.9.6.D.2, County owned land that is not managed as parkland by the M-NCPPC may not add any impervious surface and the maximum total impervious surface area for any development after August 4, 2014 is six percent.

There is approximately 12,505 square feet of impervious materials currently located in the southeastern portion of the property, adjacent to Whelan Lane. This area consists of compacted aggregate, including gravel. The Application proposes to remove the existing impervious materials, dispose of them at an approved waste site, and decompact the soils to a minimum depth of 12 inches. The Application proposes approximately 10,405 square feet of impervious surface related to the substation for a net reduction of 2,100 square feet. The proposed impervious surface consists of the substation and associated pad, and a gravel access road. The Application as proposed includes a total of 10,405 square feet of impervious surfaces over a 523,591 square foot net tract area, resulting in two percent imperviousness, as shown on the Impervious Surface Plan. The Application is in conformance with the Clarksburg West Overlay Zone as there will be no additional impervious surfaces on County owned land and the proposed impervious surface on the property is less than six percent.

This action is proposed in an “Impervious Area Plan” (Exhibit 64(b)) filed by the Applicant, and reproduced below:





Existing Impervious Areas					
Number	Description	Area (ft2)	Percent of Property	Area to be Removed (ft2)	Area to Remain (ft2)
1	Abandoned Area	12505	2.4%	12505	0
Proposed Impervious Areas					
Number	Description	Area (ft2)	Percent of Property	Area to be Removed (ft2)	Area to Remain (ft2)
2	Gravel Substation Pad	10405	2.0%	0	10405

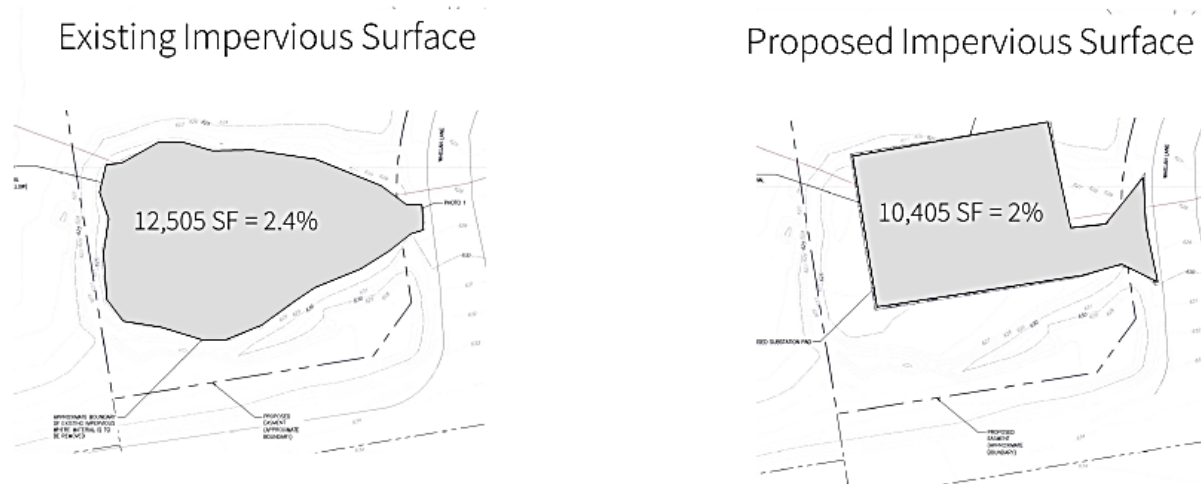
- AS DESCRIBED IN SHEETS 1 OF 3 AND 2 OF 3, THE IMPERVIOUS AREA EXISTING ON THE PROJECT PROPERTY IS 12,505 SQUARE FEET AND MAKES UP 2.4% OF THE PROPERTY.
- POST DEVELOPMENT, THE IMPERVIOUS AREA ON THE PROJECT PROPERTY IS APPROXIMATELY 10,405 SQUARE FEET AND MAKES UP 2.0% OF THE PROPERTY.
- THE IMPERVIOUS AREA OF THE SITE WILL BE APPROXIMATELY REDUCED FROM 2.4% OF PROPERTY TO 2.0% OF THE PROPERTY AND THUS SATISFIES THE REQUIREMENT OF THE OVERLAY ZONE OF ZONING TEXT AMENDMENT 14-03 AND THE COUNCIL RECOMMENDATION.
- REFERENCE SECTION 4.9.6.D.2 OF CHAPTER 59 REGARDING COUNTY OWNED LAND NOT ADDING ANY IMPERVIOUS SURFACE. BASED ON THESE IMPERVIOUS AREA PLANS PROVIDED HEREIN, THIS PROJECT PROPOSES NO INCREASE IN IMPERVIOUS AREA AND ACTUALLY SHOWS A PROPOSED DECREASE IN IMPERVIOUS AREA, THEREFORE MEETING THE REQUIREMENTS OF THE CLARKSBURG WEST ENVIRONMENTAL OVERLAY ZONE.

IMPERVIOUS AREA REMOVAL AND RESTORATION NOTES:

1. NO CLEARING OR EARTH DISTURBANCE IS TO TAKE PLACE OUTSIDE OF LIMITS OF DISTURBANCE (LOD).
2. FOR THOSE AREAS WHERE IMPERVIOUS SURFACES ARE TO BE REMOVED: REMOVE IMPERVIOUS MATERIAL WITHIN LIMITS OF DISTURBANCE INDICATED ON SHEET 2 TO A MINIMUM OF 2 FEET BELOW ANTICIPATED FINISHED GRADE. IMPERVIOUS MATERIAL WILL BE REMOVED FROM THE PROPERTY. THE MATERIAL WILL NOT BE USED AS A BACKFILL. ANY AREAS REQUIRING BACKFILLING WILL BE DONE SO WITH IMPORTED TOPSOIL AND GRADED TO FINAL CONTOURS OF THE SITE.
3. FOR IMPERVIOUS AREAS TO BE RESTORED TO PERVIOUS CONDITION: SOIL TO BE DECONSOLIDATED USING EQUIPMENT MOUNTED RAKE. CONDUCT A NUMBER OF PASSES OF EQUIPMENT IN PERPENDICULAR DIRECTIONS UNTIL SOIL IS SUFFICIENTLY MIXED AND FRIABLE. LARGE CHUNKS OF ROCK/SOIL THAT CANNOT BE BROKEN DOWN TO PIECES LESS THAN 2 INCHES DIAMETER SHOULD BE REMOVED. ONCE THE SOIL IS DECONSOLIDATED, M-NCPPC STAFF INSPECTOR SHOULD REVIEW AND APPROVE THE WORK BEFORE INITIATING THE NEXT STEP.
4. APPLY 2 INCHES OF CERTIFIED COMPOST ACROSS AREAS SLATED FOR RESTORATION TO PERVIOUS CONDITION. MIX WITH HAND TOOLS OR SMALL EQUIPEMENT INTO TOP 4 INCHES OF SOIL. ONCE THE COMPOST IS SUFFICIENTLY MIXED, RAKED FINISHED MATERIALS TO REESTABLISH GRADES. CARE SHOULD BE MADE TO AVOID RE-COMPACTING SOIL.
5. STABILIZE AREA SLATED FOR RESTORATION TO PERVIOUS CONDITION BY ADDING NATIVE GRASS SEED MIX AT A RATE OF 0.5 POUNDS/1,000 SF. ANNUAL RYE (LOLIUM MULTIFLORUM) SHOULD BE OVER SEEDED AT 1 POUND/1,000 SF TO AID IN EROSION CONTROL. AFTER SEEDING, THE AREA SHOULD BE COVERED WITH CLEAN WHEAT STRAW AT A DEPTH OF APPROXIMATELY 1 INCH.
6. AT THE COMPLETION OF REMOVAL/RESTORATION WORK AND ONCE VEGETATION IS ESTABLISHED, AN M-NCPPC INSPECTOR SHALL INSPECT AND APPROVE THE REMOVAL OF ANY SEDIMENT CONTROL AND TREE PROTECTION MEASURES. THE INSPECTOR WILL ALSO REVIEW THE SITE TO DETERMINE THAT THE RESTORATION WORK WAS DONE CORRECTLY AND THAT CONDITIONS ARE ACCEPTABLE.

Technical Staff's PowerPoint presentation to the Planning Board contained an informative depiction of the proposed reduction in the impervious area on the site (Exhibit 52(a), Slide 8). It is reproduced below:

Clarksburg West Environmental Overlay Zone



Impervious Surface Limits - Reduction in impervious surfaces from 12,505 SF to 10,405 SF
 Application proposes 2% imperviousness < CWE Overlay Zone limit of 6%

CU-19-07 Potomac Edison Company-Clarksburg Substation

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2. Forest Conservation:

As noted above, the Applicant has submitted a Preliminary/Final Forest Conservation Plan (P/FFCP) as Exhibit 42(a). Technical Staff reports (Exhibit 43, p. 9) that under the Plan,

All the existing forest, steep slopes, and other environmental features will be left undisturbed. The unforested stream buffers will be planted to establish forest cover, and the newly planted forest, retained forest, and environmental buffers will be protected in a Category I conservation easement.

The Planning Board approved both the P/FFCP and the P/FWQP, with conditions, on March 28, 2019, Exhibit 54.

Based on this record, the Hearing Examiner finds that the Applicant has appropriately addressed all the environmental concerns and will meet the requirements of the SPA.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A conditional use is a zoning device that authorizes certain uses provided that pre-set legislative standards are met. Pre-set legislative standards are both specific and general. General standards are those findings that must be made for all conditional uses. *Zoning Ordinance*, §59.7.3.1.E. Specific standards are those which apply to the particular use requested, in this case, a Public Utility Structure. *Zoning Ordinance* §59.3.6.7.E.

Weighing all the testimony and evidence of record under the “preponderance of the evidence” standard specified in *Zoning Ordinance* §59.7.1.1, the Hearing Examiner concludes that the conditional use proposed in this application, as governed by the conditions imposed in Part IV of this Report and Decision, would satisfy all of the requirements for the use.

A. Necessary Findings (Section 59.7.3.1.E.)

The general findings necessary to approve a conditional use are found in Section 59.7.3.1.E. of the Zoning Ordinance. Standards pertinent to this review, and the Hearing Examiner’s conclusions for each finding, are set forth below:⁶

E. Necessary Findings

1. To approve a conditional use application, the Hearing Examiner must find that the proposed development:

a. satisfies any applicable previous approval on the subject site or, if not, that the previous approval must be amended;

Conclusion: Technical Staff advises that there are no previous conditional use approvals applicable to the property. However, as noted by Technical Staff (Exhibit 43, p. 14):

A Final Forest Conservation Plan was approved on July 7, 2004 and amended on September 9, 2011. A second Amended Final Forest Conservation Plan has been submitted by the Applicant to show the proposed use on the plan drawings and will be reviewed administratively by Staff.

⁶ Although §59.7.3.1.E. contains six subsections (E.1. through E.6.), only subsections 59.7.3.1.E.1. and E.3. contain provisions that apply to this application. Section 59.7.3.1.E.1. contains seven subparts, a. through g.

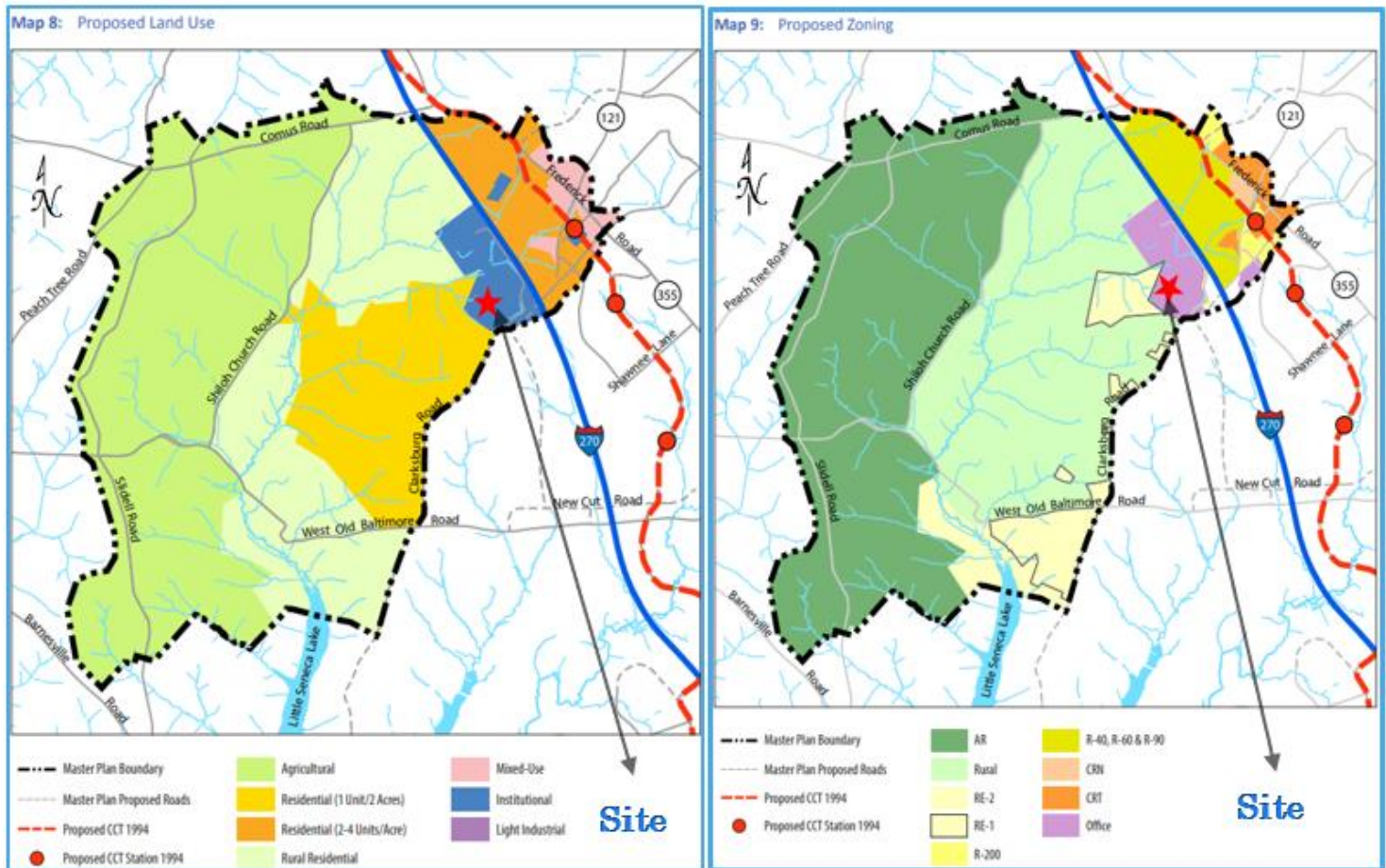
The Planning Board approved the new Preliminary/Final Forest Conservation Plan (P/FFCP) (Exhibit 42(a)) and the Preliminary/Final Water Quality Plan (Exhibits 15 and 15(a)) on March 28, 2019. Exhibit 54. A condition requiring that the Applicant comply with the approved P/FFCP and the approved P/FWQP) is included in Part IV of this Report and Decision. Based on this record, the Hearing Examiner finds that all applicable previous approvals, as amended, will be followed, and this provision is satisfied.

b. satisfies the requirements of the zone, use standards under Article 59-3, and to the extent the Hearing Examiner finds necessary to ensure compatibility, meets applicable general requirements under Article 59-6;

Conclusion: This subsection requires an analysis of the standards of the EOF-0.75 H-100 T (Employment Office) Zone and the Clarksburg West Environmental Overlay Zone contained in Article 59-4; the use standards for a Public Utility Structure contained in Article 59-3; and the applicable development standards contained in Article 59-6, as necessary to ensure compatibility. Each of these Articles is discussed below in separate sections of this Report and Decision (Parts III.B, C, and D, respectively). Based on the analysis contained in those discussions, the Hearing Examiner finds, as did Technical Staff (Exhibit 43, p. 14), that with the conditions specified in Part IV of this Report and Decision, the application satisfies the requirements of Articles 59-3, 59-4 and 59-6.

c. substantially conforms with the recommendations of the applicable master plan;

Conclusion: The subject property lies within the geographic area covered by the 2014 10 Mile Creek Area Limited Amendment to the Clarksburg Master Plan and Hyattstown Special Study Area. The site is depicted in the Proposed Land Use and Proposed Zoning maps in the “Limited Amendment” (Plan pp. 32-33). Those maps are reproduced below, with tags identifying the site:



As can be seen in these maps, the subject site is in an area planned for Institutional land use and “Office” zoning. To the west and southwest of the site, the plans include future residential development; however, the most important aspects of the “Limited Amendment” concern environmental issues, as discussed by Technical Staff in its report (Exhibit 43, pp. 8-9):

The proposed substation substantially conforms with the applicable sections of the 2014 10 Mile Creek Limited Amendment. The proposed substation supports the Limited Amendment's core vision. It will provide electrical utility services to meet the increased demand that has arisen from the development of a "complete, well-defined corridor town that provides jobs, homes, and commercial activities." (page 5). In addition, constructing the substation offers an opportunity to reduce imperviousness and contribute to the preservation of critical natural resources.

The Limited Amendment's recommendations for properties located west of I-270 include reducing development footprints and impervious cover, reducing impacts to forest and steep slopes, and protecting stream conditions and environmental buffers.

It further recommends that imperviousness be limited to six percent with no additional impervious cover on County-owned properties (page 45).

The Master Plan notes that Forest Conservation Plans for properties in the 10 Mile Creek Watershed should protect all forest on County-owned properties. The disturbance associated with the Application is limited to an area that has already been disturbed and includes impervious cover. The existing impervious surfaces will be removed, and the new impervious surface for the substation will result in a net decrease in impervious surface on the property, which will also be less than six percent. All the existing forest, steep slopes, and other environmental features will be left undisturbed. The unforested stream buffers will be planted to establish forest cover, and the newly planted forest, retained forest, and environmental buffers will be protected in a Category I conservation easement.

Conclusion: Technical Staff concludes that “the proposed modular substation substantially conforms to the applicable sections of the *10 Mile Creek Limited Amendment*. The proposed substation is designed to preserve natural resources critical to the County's well-being in addition to furthering the *2014 10 Mile Creek Limited Amendment's* core visions.” Exhibit 43, p. 18.

The Hearing Examiner agrees with Staff's conclusion, especially given that the new impervious surface for the substation will result in a net decrease in impervious surface on the property, and all the existing forest, steep slopes, and other environmental features will be left undisturbed. The Hearing Examiner therefore concludes that the proposed conditional use will substantially conform with the recommendations of the applicable master plan, as required by this provision.

d. is harmonious with and will not alter the character of the surrounding neighborhood in a manner inconsistent with the plan;

Conclusion: Technical Staff replies to this provision as follows (Exhibit 43, p. 18):

With the recommended conditions, the proposed use will be in harmony with the general character of the neighborhood. The Conditional Use Site and Landscape Plans provide for extensive landscaping and adequate setbacks meeting code requirements. There is extensive buffering, in the form of landscaping, fencing, major roads and commercial development, between the nearest residential properties and the proposed use. The Applicant's statement of justification indicates that the proposed utility will be unmanned and, once constructed, will not impact

traffic, produce odors or dust, or impact parking. The proposed structure will operate 24 hours a day, seven days a week and there will be no employees present daily. Potomac Edison employees will visit the site to perform periodic maintenance.

Because of the nature of the use, as an unmanned substation with periodic visits by no more than two employees, it is unlikely that the proposed use will generate a level of traffic or noise that will adversely affect the residential neighborhood.

As discussed in response to the previous provision, the proposed conditional use will substantially conform with the recommendations of the applicable Master Plan. It will not alter the surrounding neighborhood in a manner inconsistent with the Master Plan because it fulfills the Plan's main goal of preserving the environment. It will be harmonious with the neighborhood because it will be a small facility that is adequately screened and not near existing residential properties. Thus, the Hearing Examiner finds that the proposed use will comply with this provision.

e. will not, when evaluated in conjunction with existing and approved conditional uses in any neighboring Residential Detached zone, increase the number, intensity, or scope of conditional uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area; a conditional use application that substantially conforms with the recommendations of a master plan does not alter the nature of an area;

Conclusion: Technical Staff indicated that there are no other conditional uses in the defined neighborhood (Exhibit 43, p. 18). Staff concluded, and the Hearing Examiner agrees, that the proposed use will not cause any significant traffic or other adverse effects. It will not “increase the number, intensity or scope of Conditional Uses sufficiently to affect the area adversely” and it cannot “alter the predominantly residential nature of the area” since it is not in a predominantly residential area. Moreover, as the language of this Code section notes, “a conditional use application that substantially conforms with the recommendations of a master plan does not alter the nature of an area.” As discussed above, the proposed use would

substantially conform to the recommendations of the applicable Master Plan and will not affect the area adversely due to the number of conditional uses in the neighborhood. Therefore, the Hearing Examiner finds that the terms of this Code provision have been satisfied.

f. will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage, and other public facilities. If an approved adequate public facilities test is currently valid and the impact of the conditional use is equal to or less than what was approved, a new adequate public facilities test is not required. If an adequate public facilities test is required and:

i. if a preliminary subdivision plan is not filed concurrently or required subsequently, the Hearing Examiner must find that the proposed development will be served by adequate public services and facilities, including schools, police and fire protection, water, sanitary sewer, public roads, and storm drainage; or

ii. if a preliminary subdivision plan is filed concurrently or required subsequently, the Planning Board must find that the proposed development will be served by adequate public services and facilities, including schools, police and fire protection, water, sanitary sewer, public roads, and storm drainage; and

Conclusion: Technical Staff reports that “The Application is not subject to approval of a Preliminary Plan of Subdivision.” Exhibit 43, p. 19. Therefore, under this provision, “*the Hearing Examiner must find that the proposed development will be served by adequate public services and facilities.*” That is relatively easy to do in this case, since the nature of the use is such that it does not require water or sewer services; it will not produce any students to burden the school system; and it will create almost no traffic. As stated by the Applicant in its Statement of Compliance and Justification (Exhibit 1, p. 16):

The proposed Utility does not require public services and facilities, including schools, water, and sanitary sewer, because it is an unmanned electric substation. There will be no impact to the public roads. See Transportation Statement (Exhibit 12).

Technical Staff agreed (Exhibit 43, p. 19):

A traffic study was not needed for the subject Conditional Use to satisfy Local Area Transportation Review because the proposed unmanned electric distribution substation would not add any peak-hour vehicular trips from this existing land use. The proposed facility will be unmanned and only require routine inspections or service visits once or twice a month. Thus, the intersection congestion levels would not be increased during the weekday morning (6:30 to 9:30 a.m.) and evening (4:00 to 7:00 p.m.) peak periods.

Staff supports the transportation elements of the Application and finds the proposed access to the property to be adequate to serve the traffic generated by the development.

Staff also reports that police and fire protection are available (Exhibit 43, p. 19):

Montgomery County Fire Station 35 is located at 22610 Gateway Center Drive approximately 1.0 miles northeast of the property. The closest police station is located at 2000 Aircraft Drive in Germantown, approximately 4.5 miles south of the property.

Storm drainage facilities are addressed in the Applicant's P/FWQP, which has been approved by DPS and the Planning Board (Exhibits 15 and 54).

There is no contrary evidence in the record. Given this evidence, and Technical Staff's similar conclusion, the Hearing Examiner finds that the proposed use on the subject site will be served by adequate public services and facilities.

g. will not cause undue harm to the neighborhood as a result of a non-inherent adverse effect alone or the combination of an inherent and a non-inherent adverse effect in any of the following categories:

- i. the use, peaceful enjoyment, economic value or development potential of abutting and confronting properties or the general neighborhood;***
- ii. traffic, noise, odors, dust, illumination, or a lack of parking; or***
- iii. the health, safety, or welfare of neighboring residents, visitors, or employees.***

Conclusion: This standard requires consideration of the inherent and non-inherent adverse effects of the proposed use, at the proposed location, on nearby properties and the general neighborhood. *Inherent adverse effects* are “adverse effects created by physical or operational characteristics of a conditional use necessarily associated with a particular use, regardless of its physical size or scale of operations.” Zoning Ordinance, §59.1.4.2. *Non-inherent adverse effects* are “adverse effects created by physical or operational characteristics of a conditional use not necessarily associated with the particular use or created by an unusual characteristic of the site.” *Id.* As specified in §59.7.3.1.E.1.g., quoted above, non-inherent adverse effects in the listed categories, alone or in conjunction with inherent effects in those categories, are a sufficient basis to deny a conditional use. Inherent adverse effects, alone, are not a sufficient basis for denial of a conditional use.

Analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with a public utility structure. Characteristics of the proposed use that are consistent with the characteristics thus identified will be considered inherent adverse effects. Physical and operational characteristics of the proposed use that are not consistent with the characteristics identified *or* adverse effects created by unusual site conditions, will be considered non-inherent adverse effects. The inherent and non-inherent effects then must be analyzed, in the context of the subject property and the general neighborhood, to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

Technical Staff determined that the following physical and operational characteristics are necessarily associated with (*i.e.*, are inherent in) a public utility structure (Exhibit 43, p. 20):

- (1) buildings and structures, to accommodate the generating and mechanical operations;
- (2) lighting
- (3) adequate parking areas to accommodate employees; and
- (4) noise associated with transformers, HVAC and other mechanical equipment.

Staff also noted that the access point, the internal vehicular circulation system, the onsite parking areas, and the occasional loading and unloading of supplies and equipment needed for maintenance of the facility are operational characteristics typically associated with unmanned public utility structures.

The Hearing Examiner agrees that these characteristics are inherent in a public utility structure, but “the devil is in the details” because the size of the proposed facility on any given site, in relation to its neighbors, and the level of noise generated may be non-inherent characteristics for any particular project. Those issues will be discussed below in connection with the facts of this case.

As correctly observed by Technical Staff (Exhibit 43, p. 20), the fact that the subject site is located in the Clarksburg West Environmental Overlay Zone and that it is in a Special Protection Area are non-inherent site conditions in this case; however, the Hearing Examiner agrees with Staff that this factor is “not sufficient to warrant a denial.”

Staff analyzed each of the three categories of potential harm to the neighborhood listed in Section 59.7.3.1.E.1.g.. The first category consists of the potential impacts on the use, peaceful enjoyment, economic value or development potential of nearby properties and the neighborhood. Technical Staff responded as follows (Exhibit 43, p. 20):

- i. The use, peaceful enjoyment, economic value or development potential of abutting and confronting properties or the general neighborhood;*

The proposed modular substation is designed to blend with the adjoining forested area and stream valley buffers. Existing forest and ample landscaping screen the proposed use from adjoining roads and nearby residential and non-residential uses. The proposed lighting will not cause glare on adjoining properties. The subject property does not abut any residential property.

Conclusion: Based on the clear weight of the evidence, the Hearing Examiner finds that that the proposed use will cause no undue harm to the use, peaceful enjoyment, economic value or

development potential of abutting and confronting properties or the general neighborhood. As Staff points out, there are no abutting or confronting residential properties to be adversely affected. The proposed facility will be adequately screened from its surroundings and it will protect the environment, including water quality. Moreover, the addition of adequate electrical capacity to supply power to new development can hardly be characterized as a potential harm to the area's economic value or development potential.

The next category of potential harm to the neighborhood listed in Section 59.7.3.1.E.1.g.. concerns possible impacts of traffic, noise, odors, dust, illumination or lack of parking. Technical Staff addresses this topic as follows (Exhibit 43, pp. 20-21):

ii. Traffic, noise, odors, dust, illumination or lack of parking;

Based on the traffic statement and staff analysis, the vehicular movements on the road will not cause undue harm to the neighborhood. The lighting plan adequately and efficiently provides a safe vehicular and pedestrian environment. The proposed lighting will not cause glare on adjoining properties, nor will it exceed the 0.1 foot-candle standard at the side and rear property lines.

The Applicant has indicated that the proposed use will meet all applicable County noise regulations. To ensure that noise levels related to activities of the substation are kept to a minimum, the Applicant has submitted an evaluation (Attachment C [to the Staff Report]) using the Noise Ordinance's (Section 31b-5(a)(1)) maximum night-time noise standard (55 dBA at the nearest property line). The evaluation calculated sound level reduction using a distance of 50 feet, since the transformer will be set back at least 50 feet from all easement boundaries. The evaluation concluded that the maximum audible sound level at 50 feet from the transformer will be 39 dB. The result indicates that the transformer will be well within the Maximum Allowable Noise Level required by the Montgomery County noise ordinance for non-residential and residential areas.

There is no odor or dust associated with the operation of the project or the equipment within the building.⁷ The proposed access to the property is adequate to serve the traffic generated by the development. Adequate parking is provided to serve the proposed use.

⁷ Once again, as noted earlier, there will be no building on the site (Tr. 44), so Staff should more properly have referred to equipment within the enclosure, not within a "building."

Conclusion: There is no contrary evidence in the record. The use will not produce significant traffic; will not cause odors or dust; will have non-obtrusive illumination; will produce noise within required limits; and will have limited, but adequate, parking on site. Based on this record, the Hearing Examiner finds the proposed use will not generate traffic, noise, odors, dust, illumination or lack of parking sufficient to cause harm to the neighborhood.

The final category of potential harm to the neighborhood listed in Section 59.7.3.1.E.1.g.. concerns possible impacts on the health, safety or welfare of neighboring residents, visitors or employees. Technical Staff addresses this topic as follows (Exhibit 43, p. 21):

iii. The health, safety or welfare of neighboring residents, visitors or employees.

The proposed substation will not negatively impact the health, safety or welfare of neighboring residents, visitors or employees. The intersection congestion level in the area will not be affected by the establishment of the proposed use at the subject location. The facility will be unmanned and will only require routine inspections or service once or twice a month. The proposed access to the property is adequate to serve the traffic generated by the development.

The use will be adequately screened and buffered from the views of neighboring properties, with minimal lighting and glare, and no significant traffic impact. As noted the property does not abut any residential dwellings. The Conditional Use application will not cause objectionable noise.

Conclusion: The Hearing Examiner finds that there is no evidence in this record that the proposed use would have any adverse effect on the health, safety or welfare of neighboring residents, visitors or employees. The electrical facility will be connected by underground cables, so the only physical danger to the public would be if some unauthorized person gained access to the facility. The Applicant's plans call for the area to be fenced off and locked, so the Applicant is taking reasonable precautions against unauthorized entry. The Hearing Examiner therefore concludes that the third prong of Section 59.7.3.1.E.1.g. has been satisfied.

Technical Staff concluded (Exhibit 43, p. 21), “With the recommended conditions of approval, the inherent and non-inherent impacts associated with the proposed uses do not rise to a level sufficient to warrant a denial of the Application”

Conclusion: Based on the entire record, the Hearing Examiner finds that, with the conditions imposed in Part IV of this Report and Decision, the proposed use will not cause undue harm to the neighborhood as a result of non-inherent adverse effects alone or the combination of inherent and non-inherent adverse effects in any of the categories listed in §59.7.3.1.E.1.g.

2. Any structure to be constructed, reconstructed, or altered under a conditional use in a Residential Detached zone must be compatible with the character of the residential neighborhood.

Conclusion: This provision is not applicable since the site is not in a *Residential Detached zone*.

3. The fact that a proposed use satisfies all specific requirements to approve a conditional use does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require conditional use approval.

Conclusion: The application satisfies all specific requirements for the conditional use, and as discussed above, the proposed use will be compatible with the neighborhood. The Hearing Examiner concludes that, with the conditions imposed in Part IV of this Report and Decision, the conditional use should be approved.

B. Development Standards of the Zone (Article 59.4)

In order to approve a conditional use, the Hearing Examiner must find that the application meets the development standards of the zone where the use will be located – in this case, the EOF 0.75 H-100 T (Employment Office) Zone and the Clarksburg West Environmental Overlay Zone.

Development standards for the EOF Zone are contained in §59.4.6.3.E. of the Zoning Ordinance and in the specifications of the zone, itself. The specifications of the zone in question,

the EOF 0.75 H-100 T Zone, provide for a maximum density of 0.75 FAR (floor area ratio) and a height limit of 100 feet. According to the Applicant's Conditional Use Plan (Exhibit 42(b)) and testimony (Tr. 44), the equipment will not be enclosed in a building, and therefore the density restriction is not applicable. The height limit for the zone is specified in the Zone's own definition as 100 feet, and the structure in question will be about 37 feet in height, and will therefore be compliant.

Staff compared the minimum development standards of the EOF Zones to those provided by the application in a Table included in the Staff Report (Exhibit 43, p. 10), and reproduced below. According to Technical Staff, the application meets the general development standards of the EOF zone, most of which are not applicable to a "general" structure.

Table 1: EOF Zone: Development Standard

Development Standards EOF Zone		
EOF-Zone	Required (59-4.6.3.E)	Proposed
Open Space	10 percent	
Minimum Lot Area		12.02 ac
Minimum Lot width: <ul style="list-style-type: none"> ▪ at street line ▪ at building line 	N/A	
Maximum Building Density	0.75 FAR (mapped)	N/A
Minimum Building Setback Principal Building: <ul style="list-style-type: none"> • front • side street • side • rear yard 	0	N/A
Maximum Building Height	100 ft (mapped)	37 ft
Minimum Parking	N/A	2 spaces

Conclusion: As can be seen from the above discussion and Table, the proposed use more than meets all the development standards of the EOF Zones, as provided in Zoning Ordinance §59.4.6.3.E., and in the EOF 0.75 H-100 T Zone's own specifications.

The Development standards of the Clarksburg West Environmental Overlay Zone are contained in Zoning Ordinance §59.4.9.6. They pertain to environmental features which are discussed at length in Part II.E. of this Report and Decision (at pp. 18-22). As shown there, and as concluded by Technical Staff (Exhibit 43, pp. 9-10), “The Application is in conformance with the Clarksburg West Overlay Zone as there will be no additional impervious surfaces on County owned land and the proposed impervious surface on the property is less than six percent.” The Hearing Examiner agrees and so finds.

C. Use Standards for a Public Utility Structure (Section 59.3.6.7.E.)

The specific use standards for approval of a Public Utility Structure are set out in Section 59.3.6.7.E. of the Zoning Ordinance:

1. Defined

Public Utility Structure means a utility structure other than transmission lines or pipelines. Public Utility Structure includes structures for the occupancy, use, support, or housing of switching equipment, regulators, stationary transformers, and other such devices for supplying electric service or other public utilities.

Conclusion: The proposed structure will house a modular electrical substation with a transformer, related equipment and underground incoming and outgoing lines. As stated by Technical Staff (Exhibit 43, p. 14), “the proposed public utility structure meets the definition of the use as described by this section.” The Hearing Examiner so finds.

2. Use Standards

a. Where a Public Utility Structure is allowed as a limited use, and the subject lot abuts or confronts a property zoned Agricultural, Rural Residential, or Residential Detached that is vacant or improved with an agricultural or residential use, site plan approval is required under Section 7.3.4.

Conclusion: The proposed public utility structure is applied for as a conditional use, not a limited use, so this subsection is not applicable.

b. Where a Public Utility Structure is allowed as a conditional use, it may be permitted by the Hearing Examiner under Section 7.3.1, Conditional Use, and the following standards:

i. The proposed structure at the location selected is necessary for public convenience and service.

Conclusion: The need for the proposed substation is established in the *Applicant's Statement of Compliance and Justification* (Exhibit 1, p. 1):

The proposed Utility will serve the increased demand for electric services from new developments, which cannot be served by the existing distribution system. The proposed Utility will meet the increased demand for electrical utility services, and avoid overloading the existing distribution system. The proposed Utility will bring an additional estimated load of 23 MVA, increase the capacity of the existing distribution system, and minimize extended outages in the event of a distribution system failure. The Property is proximate to both Potomac Edison's existing 34.5kV sub-transmission lines and the customers it will serve.

Applicant's statement is supported by testimony at the hearing from Justin Walter, Applicant's Project Manager (Tr. 29):

[T]he developments in that area, primarily the Cabin Branch residential and commercial developments, as well as some of the other developments in that area, based on . . . the projections of the developers and the existing load in the area, we anticipate that they're going to exceed the existing distribution system within the next -- within the next year at this point based on current projections. So that -- that requires that we -- we bring in additional capacity. And so that's the purpose of -- of the substation in this area, to -- to increase the capacity to allow us to serve the additional load.

Technical Staff agreed with the Applicant's statement (Exhibit 43, p. 16):

The unmanned substation is needed to accommodate higher service demand in the area brought about by increased residential, office and commercial developments which include 2,386 units residential units and 2.42 million square feet commercial space, including an outlet mall, office buildings gas station, bank, hotel, restaurants, public use, some of which are currently under construction (Preliminary Plan 12003110B and C). The new distribution will help to alleviate predicted overloads.

There is no evidence in the record contradicting Potomac Edison Company's claim that the proposed structure is necessary for public convenience and service, and the Hearing Examiner so finds.

ii. The proposed structure at the location selected will not endanger the health and safety of workers and residents in the community and will not substantially impair or prove detrimental to neighboring properties.

Conclusion: For the reasons discussed at length in Part III. A. of this Report and Decision, the Hearing Examiner finds that the proposed structure at the location selected will not endanger the health and safety of workers and residents in the community and will not substantially impair or prove detrimental to neighboring properties.

iii. A Public Utility Structure allowed in any Rural Residential or Residential zone, must, whenever practicable, have the exterior appearance of a residential building and must have suitable landscaping, screen planting and fencing, wherever deemed necessary by the Hearing Examiner.

Conclusion: As stated by Technical Staff (Exhibit 43, p. 17),

This requirement does not apply to the subject property since the proposed substation is in the EOF Zone. However, in response to staff comments and recommendations, the Applicant's landscape plan provides for extensive landscaping and fencing for the purposes of screening and aesthetic appeal.

The Hearing Examiner agrees, and so finds.

iv. The Hearing Examiner may waive the height limits of the applicable zone where, in the opinion of the Hearing Examiner, adjacent residential uses will not be adversely affected by the increased height.

Conclusion: The proposed structure of 37 feet in height does not exceed the height limits of the applicable EOF 0.75 H-100 T Zone (100 feet), and thus no waiver has been sought; nor is one called for.

v. An applicant for a Public Utility Structure may file a conditional use application if the applicant states in writing under oath that a bona fide effort has been made to obtain a contractual interest in the subject property for a valid consideration without success, and that there is an intent to continue negotiations to obtain the required interest or in the alternative to file condemnation proceedings should the conditional use be approved.

Conclusion: The conditional use site consists of a 0.702-acre (30,573 square foot) plot of land, carved out of a 12.02-acre tract owned by Montgomery County. The County granted the Applicant a 99-year exclusive easement for the site (Exhibit 5), which is located approximately 100 feet north of Whelan Lane's intersection with Clarksburg Road. Thus, the Hearing Examiner finds that the Applicant has already obtained the needed contractual interest in the site.

Conclusion: In sum, the application satisfies all of the use standards in Code §59.3.6.7.E.

D. General Development Standards (Article 59.6)

Article 59.6 sets the general requirements for site access, parking, screening, landscaping, lighting, and signs. Under Section 59.7.3.1.E.1.b. of the Zoning Ordinance, the requirements of these sections need be satisfied only “to the extent the Hearing Examiner finds necessary to ensure compatibility.” The applicable requirements, and whether the use meets these requirements, are discussed below.

1. Site Access Standards

Section 6.1.2. Applicability

Division 6.1 applies to development in the Residential Multi-Unit, Commercial/Residential, Employment, Industrial, and Floating zones if:

- A. an apartment, multi use, or general building type is proposed; and*
- B. a site plan or conditional use approval is required.*

Conclusion: Zoning Ordinance Division 59.6.1. governs Site Access; however, by its own terms, as stated in §59.6.1.2., Division 59.6.1, it applies to proposed development involving a building of some kind. That is not the case here, where electrical equipment, and not a building, is proposed. Nevertheless, Technical Staff did address planned access to the site (Exhibit 43, p. 7, 10-11)):

The proposed substation will be accessed from Whelan Lane via a single driveway. The existing driveway apron will be modified and upgraded to meet the needs of the proposed use. The driveway apron will be widened to 60 feet, then narrowing to 22 feet wide in the interior of the subject property. . . .

* * *

Site access is adequate; turning movements into the site will not impede vehicle movement through the intersection of Whelan Lane and Clarksburg Road. Very few vehicles that will enter the site, approximately one or two visits per month. These visits will likely occur during the non-AM or PM peak period.

* * *

The proposed access point appears to be within the standard minimum 300' spacing distance from an intersection. However, it is unclear if this intersection still exists with the Clarksburg Road realignment. The applicant should provide a statement of justification to explain how the proposed access point will be adequate and safe and revised plans should show right-of-way widths for Whelan Lane and Old Clarksburg Road. The Applicant shall construct the access entrance with the maximum 15 feet curb radius as required by the EOF zone. The width shall remain 22'. To accommodate emergency vehicle access, the curbs may be mountable.

Technical Staff's notation that the Applicant needed to further address access issues was included in two conditions recommended by Staff. The Applicant did so at the hearing, stating that its plans provided information on the Whelan lane right-of-way, but could not do so regarding Clarksburg Road since its site does not abut that roadway. The Applicant agreed that it would not oppose any right-of-way specifications the County imposes on Clarksburg Road (Tr. 14-16), and the Hearing Examiner has made that a condition in Part IV of this Report and Decision.

The Applicant also indicated that it is agreeable to providing the access required by Staff's third recommended condition, but must wait until the County decides on the appropriate curb radius (Tr. 16-18). The Hearing Examiner has imposed that condition in this Report and Decision.

Conclusion: Based on this record, the Hearing Examiner finds that the Applicant has complied with all applicable standards for site access.

2. Parking Spaces Required, Parking Setbacks and Parking Lot Screening

Conclusion: The standards for the number of parking spaces required, parking setbacks and parking lot screening are governed by Division 6.2 of the Zoning Ordinance. Technical Staff indicates that "There is no parking requirement for a Public Utility Structure." Exhibit 43, p. 11.

The Applicant proposes two parking spaces. Although Staff recommends a condition that the

spaces meet the minimum dimensional requirements of the Zoning Ordinance, Staff notes that having two parking spaces “will sufficiently accommodate the parking needs of the proposed unmanned substation.” Exhibit 43, p. 11. The Applicant stated at the hearing that the parking spaces will comply with the minimum dimensional requirements of the Zoning Ordinance (Tr. 18), and a condition in Part IV of this Report and Decision so requires.

The Hearing Examiner agrees that the proposed parking will be sufficient. Technical Staff did not discuss setbacks and screening of parking spaces, but given the fact that these two parking spaces will be used only during monthly visits for maintenance, the Hearing Examiner finds that an evaluation of those issues in conjunction with parking is not necessary to ensure compatibility. In the Staff Report (Exhibit 43, pp. 2 and 11), staff had recommended that one of the spaces be a van accessible handicapped space, but Staff withdrew that recommendation at the Planning Board hearing, and the Planning Board agreed. Exhibit 54.

Based on this record, the Hearing Examiner finds that the proposed parking for the conditional use, as conditioned, will be adequate and will meet applicable statutory requirements.

3. Site Landscaping, Screening and Lighting

Standards for site landscaping and lighting are set forth in Division 6.4 of the Zoning Ordinance, and the standards for screening are set forth in Division 6.5. The stated intent of Division 6.4 is “*to preserve property values, preserve and strengthen the character of communities, and improve water and air quality.*” §59.6.4.1. The stated intent of Division 6.5 is “*to ensure appropriate screening between different building types and uses.*” §59.6.5.1.

a. Site Screening and Landscaping

The provisions of Division 6.4 are mostly general and definitional; however, the provisions of Division 6.5 are very specific, but none seem to apply directly to the use proposed

in this case—an electrical substation with equipment located outside. The Hearing Examiner therefore applies the general compatibility standards specified in Section 59.7.3.1.E.1.b.

The proposed landscaping for the subject site is shown on pages 12 -14 of this Report and Decision. Technical Staff addressed the sufficiency of the proposed landscaping in its report (Exhibit 43, pp. 12, 16-17):

The proposed landscaping with an emphasis on native species is adequate, safe, and efficient. The Landscape Plan achieves the stated objectives in the Zoning Ordinance while providing an attractive appearance throughout the year. Along with existing forest on the property, the landscaped area provides screening and buffering between the project and adjacent roads as well as the nearest residential property, which is 850 feet southwest of the proposed facility. The Application will substantially meet the tree canopy coverage requirement as well.

* * *

The proposed landscape plan provides for extensive screening, in the form of landscaping that includes a combination of shade and ornamental trees and shrubs, on all sides of the property including its frontages on Whelan Lane.

A six-foot-tall chain link fence with a one-foot anti-climbing barbed wire top is also proposed with the landscaping and screening of the property. The fence, which will surround the electrical equipment powering the modular substation, is screened by existing trees and the proposed landscaping. It will provide an added safety and secure element without affecting the aesthetic appearance of the property.

Conclusion: Based on this record, the Hearing Examiner finds that with the proposed landscaping and screening, the proposed use will be compatible with its neighborhood, and it will meet the landscaping and screening requirements of the Zoning Ordinance, to the extent that they are applicable.

b. Lighting

Newly proposed lighting from a conditional use is regulated by Section 59.6.4.4. E. of the Zoning Ordinance, which provides:

E. Conditional Uses

Outdoor lighting for a conditional use must be directed, shielded, or screened to ensure that the illumination is 0.1 footcandles or less at any lot line that abuts a lot

with a detached house building type, not located in a Commercial/Residential or Employment zone.

The Applicant described the proposed lighting for the facility in its Statement of Compliance and Justification (Exhibit 1, p. 9):

Potomac Edison will install two downward pointing 2000 Prismatic LED luminaries that will operate in the evenings and two upward pointing lighting that will operate in the evenings during emergency repairs and night inspections. With the exception of emergency repairs and night inspections, Potomac Edison will not use the upward pointing lighting.

The details of the proposed lighting are included in Exhibit 8. The Hearing Examiner notes that the Applicant's quoted description of the lighting does not fully coincide with Technical Staff's description of the lighting, since Staff's description refers only to the downward pointing lights, and does not mention "upward pointing lighting." As stated by Technical Staff (Exhibit 43, p. 13):

The proposed lighting will not cause glare on adjoining properties, nor will it exceed the 0.1 foot-candle standard at the side and rear property. The Landscape & Lighting Plan for the substation provides 2 small light fixtures on the site; both are down-lights which will not generate excessive light. Given the number and types of light fixtures, staff does not believe that a photometric plan is needed in this case.

Given the discrepancy between Staff's description and the Applicant's Statement, the Hearing Examiner raised the question at the hearing, to which the Applicant responded by pointing out that the upward facing lights will only be used when nighttime emergency repair visits are needed. The Applicant noted that the upward pointing emergency lights are depicted (but not labelled) in the diagram of the Typical Modular Substation Cross-Section in the second sheet of the Landscape, Screening and Lighting Plan (Exhibit 42(c)(ii)), shown on page 16 of this Report and Decision. They are located on the same horizontal poles that hold the two downward pointing lights. Tr. 45-48.

Conclusion: It appears that Section 59.6.4.4. E. does not directly apply to this site in an EOF Zone; however, lighting for a conditional use is also regulated by Zoning Ordinance §59.7.3.1.E.1.d., which requires a finding that the proposed use will be harmonious with the surrounding neighborhood, and by §59.7.3.1.E.1.g.ii., which requires a finding that the proposed use will not cause undue harm to the neighborhood due to “illumination,” among other factors. Those findings were made in Part III.A. of this Report and Decision, and reflect Technical Staff’s determination that “the proposed lighting will not cause glare on adjoining properties, nor will it exceed the 0.1 foot-candle standard at the side and rear property.” Exhibit 43, p. 13. Based on this record, the Hearing Examiner finds that because the upward pointing lights will be used only in emergencies, the proposed lighting for the site will not be unduly intrusive into abutting properties and will comply with the applicable sections of the Zoning Ordinance.

4. Signage

Conclusion: The use of signage is governed by Division 6.7 of the Zoning Ordinance; however, Technical Staff states that “There will be no freestanding sign identifying the proposed use on the property.” Exhibit 43, p. 13. Staff also recommended a condition to that effect (Exhibit 43, p. 2), which provides, “No identification sign, other than safety signs and those required by law, shall be placed on the property.” The Applicant agreed to that condition, and it is imposed in Part IV of this Report and Decision. Tr. 13.

IV. CONCLUSION AND DECISION

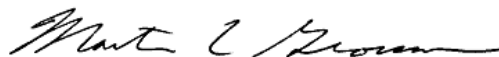
As set forth above, the application meets all the standards for approval in Articles 59-3, 59-4, 59-6 and 59-7 of the Zoning Ordinance.

Based on the foregoing findings and conclusions and a thorough review of the entire record, Application CU 19-07 filed by the Potomac Edison Company for a Conditional Use

under Zoning Ordinance §59.3.6.7.E, to allow construction and operation of a Public Utility Structure, known as the Cabin Branch Substation, at 22800 Whelan Lane, in Boyds, Maryland, is hereby **GRANTED**, subject to the following conditions:

1. No identification sign, other than safety signs and those required by law, shall be placed on the property.
2. The Applicant has indicated the right-of-way width on plans for Whelan Lane. The right-of-way on Old Clarksburg Road is not within the Applicant's control, but the Applicant must not oppose to the determination of right-of-way on that roadway by the County's Department of Transportation.
3. Once the County's Department of Transportation completes its determination regarding the appropriate curb radius and width of the site access, the Applicant must construct the access entrance with a curb radius and width in compliance with the County's determination. To accommodate emergency vehicle access, the curbs may be mountable.
4. The sizes of the two parking spaces must meet the minimum dimension standard for parallel parking.
5. The proposed structure on the subject site, and all the landscaping and other features on the subject site must conform to the final plans and conditions approved by the Hearing Examiner.
6. The hours of operation are 24 hours a day, seven days a week.
7. The Applicant must comply with the requirements and conditions of the Preliminary/ Final Forest Conservation Plan (P/FFCP) (Exhibit 42(a)) and the Preliminary/Final Water Quality Plan (P/FWQP) approved by the Planning Board on March 28, 2019.
8. The Applicant must maintain the grounds, including plantings and fencing in good condition, free from debris and undue vegetative growth.
9. The Applicant and any successors in interest must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits, necessary to occupy the conditional use premises and operate the conditional use as granted herein. The Applicant and any successors in interest shall at all times ensure that the conditional use and premises comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements, including the annual payment of conditional use administrative fees assessed by the Department of Permitting Services.

Issued this 19th day of April, 2019,



Martin L. Grossman
Hearing Examiner

NOTICE OF RIGHT TO REQUEST ORAL ARGUMENT

Any party of record may file a written request to present an appeal and oral argument before the Board of Appeals, within 10 days after the Office of Zoning and Administrative Hearings issues the Hearing Examiner's Report and Decision. Any party of record may, no later than 5 days after a request for oral argument is filed, file a written opposition to it or request to participate in oral argument. If the Board of Appeals grants a request for oral argument, the argument must be limited to matters contained in the record compiled by the Hearing Examiner. A person requesting an appeal, or opposing it, must send a copy of that request or opposition to the Hearing Examiner, the Board of Appeals, and all parties of record before the Hearing Examiner.

Contact information for the Board of Appeals is listed below, and additional procedures are specified in Zoning Ordinance §59.7.3.1.F.1.c.

The Board of Appeals may be contacted at:

Montgomery County Board of Appeals
100 Maryland Avenue, Room 217
Rockville, MD 20850
(240) 777-6600

<http://www.montgomerycountymd.gov/boa/>

The Board of Appeals will consider your request for oral argument at a work session. Agendas for the Board's work sessions can be found on the Board's website and in the Board's office. You can also call the Board's office to see when the Board will consider your request. If your request for oral argument is granted, you will be notified by the Board of Appeals regarding the time and place for oral argument. Because decisions made by the Board are confined to the evidence of record before the Hearing Examiner, no new or additional evidence or witnesses will be considered. If your request for oral argument is denied, your case will likely be decided by the Board that same day, at the work session.

Parties requesting or opposing an appeal must not attempt to discuss this case with individual Board members because such *ex parte* communications are prohibited by law. If you have any questions regarding this procedure, please contact the Board of Appeals by calling 240-777-6600 or visiting its website: <http://www.montgomerycountymd.gov/boa/>.

NOTICES TO:

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Gregory Rapisarda, Esquire
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All parties of record
Charles Frederick, Esquire, Associate County Attorney
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